No. 84-16

In the Supreme Court

OF THE

United States

KENNETH CORY, LEO T. McCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX (Vol. I)

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Appeal docketed July 5, 1984
Probable jurisdiction noted October 1, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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*The amended memorandum and order and the amended judgment of the district court, as well as the opinion of the court of appeals, are printed in the appendix to the jurisdictional statement and have not been reprinted here. Also printed in the appendix to the jurisdictional statement and not reprinted here is the text of the challenged regulations as they read when initially amended in April, 1976 (J.S. App., pp. A-38-A-42) and as they now read (J.S. App., pp. A-29-A-37).

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Western Oil & Gas Association, et al.,
Plaintiffs,

vs.

Kenneth Cory, et al.,
Defendants.

No. CIV. S-76-513 PCW

Date	NR.	Proceedings
Sept. 27, 1976	1	Complt. Iss summons.
Nov. 10, 1976	4	Notc & Mot/dismiss or stay of action. 12-20-76.
Dec. 10, 1976	8	Notc & Mot/S.J. or for Prelim. Injunct. 1-17-77.
Feb. 17, 1977		MIN ENTRY: Mot/S.J. or prlim Injunct Denied; (D) Mot/dismiss or stay action to be grntd upon receipt of (D) Ltr & Ord for sig or Crt.
May 18, 1977	18	Order—(P) Mot/S.J. Denied; (P) Mot/P.I. Denied; F.P. re action stayed.
May 20, 1977	19	JUDGT: Ent this date for defts. Approved as to form; notc 7 cpys mld.
Aug. 15, 1977	21	Stip re dismissal of action by (P) Edgington Oil Co. w/o prej.
Nov. 26, 1980	22	Pltfs notc/mot for renewed SJ—1/5/81 at 10 am
	23	Decln of J. Zaimes in suppt of motn
	24	Declns of: Cotrel; Palmer; Taafe; Waller & Swanson
Jan. 5, 1981	25	Deft not/motn for SJ—2/2/81 at 10 am
	26	Deft brf Lodged: Defts admin. record (in large box)
Jan. 19, 1981	28	Pltfs 2nd Memo suppt SJ Motn & oppos defts SJ motn

Date	NR.	Proceedings
Jan. 26, 1981	29	Defts reply brf suppt motn for SJ
Feb. 2, 1981		Min.: SJ motns submitted; ltrs to be filed by 2/9/81
Feb. 12, 1981	30	Defts ANSWER
Feb. 17, 1981	31	Pltfs ltr brf
July 29, 1981	32	Pltf's supp memo in suppt mot/SJ
Jan. 29, 1982	34	MEMORANDUM & ORDER: pltfs SJ motn granted; defts SJ motn denied; defts enjoined from assessing & collecting rent based on the volume of interstate & foreign commerce passing over tidal & submerged lands in reliance upon Cal. Admin. codes.
Feb. 1, 1982	35	JUDGMENT entered; notc mailed
Feb. 11, 1982	38	Defts notc/motn for recons.—3/22/82, 10 am
Mar. 8, 1982	39	Pltfs memo oppo defts motn for recons.
Mar. 15, 1982	40	Defts reply brf suppt recons. motn
Mar. 22, 1982		MINUTES: Defts recons. motn denied; deft prep ord
Mar. 30, 1982	41	ORDER: denying: defts motn to vacate; pltfs SJ motn; judgment be entered against plaintiffs & in favor of defts on pltfs 2nd claim on grounds of res judicata; specific modifications to be made in Memo & Ord & Judgment of 1/29; revised memo & Ord & judgment to be issued by Court.
Mar. 30, 1982	42	JUDGMENT entered 3/30/82; notc mailed
Apr. 15, 1982	44	AMENDED MEMORANDUM AND ORDER: pltfs SJ motn granted; defts motn for SJ granted as to pltfs 2nd claim & all other respects denied; defts enjoined from assessing/collecting rents
Apr. 16, 1982	45	JUDGMENT entered 4/16/82; notc mailed
May 11, 1982	46	Deft, State, NOTICE OF APPEAL; forms/ltrs sent
May 24, 1982	50	Deft/appellant's notc/motn suspend injunc. pending appeal—6/21

Date	NR.	Proceedings
June 7, 1982	53	Pltfs oppo to defts motn for suspension of injunc. pending appeal
June 14, 1982	55	Defts reply brf suppt motn for suspension of inj. pending appeal
June 22, 1982	57	Rptrs transc. hrgs. 2/2 & 3/22/81 Cert/ record mailed
July 7, 1982	59	ORDER: susp. injunction pending appeal
Aug. 18, 1982	61	Ltr brf of atty Eagan dated 2/6/81
Nov. 18, 1982		Record to 9th CA
Nov. 19, 1982		Mailed defts/appellants admin. record (lodged 1/5/81) to 9th CA as Exhibit to Clerk's Record mailed 11/18

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

Western Oil & Gas Association, et al.,
Plaintiffs-Appellees,

vs.

Kenneth Cory, et al.,
Defendants-Appellants.

No. 82-4261
D.C. No. CIV. S-76-513 PCW

Date	Filings-Proceedings
Aug. [—], 1982	Filed orig & 15 aplts' opening brief (43p), 5 excerpts of record in three volumes. (8/26) (3-day oral ext per JC) ag
Nov. 8, 1982	Filed as of Oct 29, orig & 15 aples' brief. (47 pgs) 10/26 -rmc-
Nov. 15, 1982	Filed orig & 15 aplts' reply brief (23p) (11/15) (oral ext per C') ag
Dec. 1, 1982	FILED AS OF JUNE 23, CERT. TRANSC. OF RECORD ON APPEAL IN THREE VOLUMES: VOLS. I-II, PLEADINGS, CERT, COPIES ONLY, VOL. III, REPORTERS TRANSC. ORIG. ONLY. ONE BOX OF EXHIBITS FILED IN RM. 234 -rmc-
Jan. 11, 1983	ARGUED AND SUBMITTED BEFORE TANG, ALARCON, CJJ & TAYLOR, DJ (Idaho) -db-
Mar. 10, 1983	Recvd ltr from aplt dtd 3/9, re: addt'l cits. 3/9 (PANEL) EM
Mar. 21, 1983	Recvd ltr from aple (McCUTCHEN) dtd 3/17, re: addtl cits. (3/17) PANEL EM
Jan. 13, 1984	ORDERED OPINION (TANG) FILED AND JUDGMENT TO BE FILED AND ENTERED. EM
	FILED OPINION—AFFIRMED. JS/34
	FILED AND ENTERED JUDGMENT. EM

Date	Filings-Proceedings
Jan. 27, 1984	Filed aplt's Orig + 33 Petition for Rehearing with Suggestion for Rehearing En Banc. 1/26 (Panel & Active Judges) eal
Feb. 29, 1984	Filed Order (TANG, ALARCON, CJJ & TAYLOR, DJ) The opinion is hereby amended and the cite to Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) on page 202 of the slip opinion is deleted. eal
Apr. 6, 1984	Filed Order (TANG, ALARCON, CJJ & TAYLOR, DJ): The petition for rehearing is denied and the suggestion for rehearing is rejected. EM
Apr. 10, 1984	Filed aplt's notice of appeal to the Supreme Court of the United States. (4/10) tsp
Apr. 10, 1984	Filed aplt's motion to stay issuance of mandate pending disposition of appeal to the United States Supreme Court (4/10) (Tang) tsp
Apr. 20, 1984	Filed aple's statement of non-opposition for motion to stay the mandate (4/19) (Tang) tsp
May 18, 1984	Filed Order (TANG, ALARCON, CJJ, TAYLOR, DJ) It is hereby ordered that issuance of this Court's mandate is hereby stayed pending final disposition of aplts' appeal to the U.S. Supreme Court; provided, that this stay is expressly conditioned upon payment of all volumetric rentals negotiated during the pendency of the appeal in excess of the fixed minimum annual rent into a special interest-bearing account in the State treasury, said amounts to be refunded, with interest actually earned, to the respective lessees entitled thereto in the event of a final disposition of the appeal by the Supreme Court sustaining the judgment of this court on appeal. lw

United States District Court
Eastern District of California

No. CIV. S-76-513 PCW

Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California and Union Oil Company of California,
Plaintiffs,

vs.

Kenneth Cory, Mervyn M. Dymally and Roy M. Bell, individually and in their official capacities,
Defendants.

[Filed Sep. 27, 1976]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (CIVIL ACTION)

Plaintiffs Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California and Union Oil Company of California allege as follows:

First Claim
(United States Constitution)

1. Jurisdiction over the First Claim herein arises under 28 U.S.C. § 1331 in that this is a claim arising under the Constitution of the United States; over the Second Claim herein pursuant to the principles of pendent jurisdiction; and, over the Third Claim herein under 28 U.S.C. § 2201. The amount in controversy under each claim herein is in excess of $10,000.00.

2. This case concerns the adoption by defendants Kenneth Cory, Mervyn M. Dymally and Roy M. Bell and the activities of the State Lands Commission of the State of California in imposing an unlawful system of charges for the leasing of State lands for wharves, piers, pipelines and other facilities on or under navigable waters of the United States within the State of California, to the injury of plaintiffs herein.

3. Plaintiff Western Oil and Gas Association ("WOGA") is a corporation organized under the California non-profit corporation law. Its principal place of business is Los Angeles, California. Plaintiffs Edgington Oil Company and Union Oil Company of California are corporations duly organized under the laws of the State of California. Plaintiffs Exxon Corporation, Getty Oil Company, Lion Oil Company, Pacific Refining Company, Standard Oil Company of California and Shell Oil Company are corporations duly organized under the laws of the State of Delaware. Plaintiff Atlantic Richfield Company is a corporation duly organized under the laws of the Commonwealth of Pennsylvania. All the foregoing companies are legally qualified to do and are doing business in the State of California.

4. The State Lands Commission ("SLC") is a commission created by the laws of the State of California. Defendant Kenneth Cory ("Cory") is Chairman of the SLC and defendants Cory, Mervyn M. Dymally ("Dymally") and Roy M. Bell ("Bell") are the Commissioners of the SLC. All defendants are being sued herein in their individual and official capacities. All are hereafter collectively referred to as SLC.

5. All defendants reside and maintain offices in the Eastern District of California and all claims asserted herein arose in that District.

6. The State of California, and its political subdivisions, hold, under grant from the United States under the Sub-

merged Lands Act (43 U.S.C. 1311 and 1312), title to tidelands and submerged lands beneath the navigable waters of the United States from the Mexican border on the south, to the border of the State of Oregon on the north, and from its coastline to a point three geographical miles out to sea. In addition, the State of California holds title to submerged lands, beneath streams and other navigable waters, within the State.

7. The SLC has authority by statute to administer and control State tidelands and submerged lands, beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits. It may lease such lands as provided by law. Before such a lease may be entered or renewed it must be authorized by the SLC.

8. California tide and submerged lands are used, *inter alia*, for wharves at which tankers are moored and similar facilities, and over which petroleum, petroleum products and other commodities are transported by pipeline and otherwise, and for mooring facilities placed offshore and connected by pipeline and hose with tankers. Petroleum, petroleum products, and other commodities in interstate and foreign commerce are transported by pipeline to and from said tankers and otherwise across such facilities. California tide and submerged lands are also used for pipelines to and from petroleum producing platforms in Federal areas beyond the three-mile limit, on the outer Continental Shelf, which pipelines traverse California tide and submerged lands and are used for the transportation of oil and gas in interstate commerce.

9. California's tide and submerged lands, including those held by political subdivisions, are so located that it is virtually impossible (a) to transport petroleum or other products by ship or barge to or from other states or foreign countries and into or out of California without traversing such lands; (b) to transport oil and gas or other

products by pipeline from the outer Continental Shelf to the landward portions of the State of California without traversing such lands; and, (c) to engage in intrastate commerce by ship or barge from one portion of the State to another without traversing such lands and without utilizing wharves upon said property.

10. The authority of the State over said lands is limited by the Constitution of the United States. Specifically, the State may not impose any of the following charges:

(a) Under Article I, Section 10, of the Constitution of the United States, the State may not impose, without the consent of Congress, any tax, duty, impost or other charge upon the importation of merchandise, including crude or refined petroleum, into the United States.

(b) Under Article I, Section 8, of the Constitution of the United States, California may not impose any undue burden upon foreign or interstate commerce.

(c) Under Article I, Section 10, of the Constitution of the United States, the State of California may not, without the consent of Congress, impose any duty of tonnage upon any vessel or cargo. A tonnage duty is a charge placed for the privilege of anchoring a vessel, or tying a vessel to a dock, or upon the value or amount of merchandise or commodities transported through, on or over California tide and submerged lands to the shore, if such charge is not based upon the value of facilities constructed by the state.

California has not received the requisite consent of Congress to impose any of the above type charges.

11. The State Lands Commission, acting through its members, the defendants herein, and in its capacity as administrator of California's tide and submerged lands has made such lands available for the construction of wharves

and similar facilities, and pipelines, for use as is set forth under paragraph 8 above. The State provides no facilities or services under such leases but merely provides unimproved land. At all times, to and including at least the 28th day of April, 1976, it was the practice of the SLC, pursuant to its regulations, to make said lands available by lease, and to collect a rental for such leases, based on a reasonable return on the appraised value of the land leased and the amount of land occupied by any pipeline.

12. Defendants, at the April 28, 1976, meeting of the SLC, amended the SLC's regulations to provide for the charging of "rentals" based not on the value of the land provided by the State but rather on the "volume of commodities passing over State land." Such a "rental" is known as a throughput charge. A true and complete copy of said amendments is attached hereto as Exhibit "A" and incorporated herein by this reference.

13. Pursuant to these regulations, defendants Cory, Dymally and Bell, acting as the State Lands Commission, have demanded, and continue to demand, as leases come up for renewal, are made for the first time, or as lessees seek consent for modifications or assignments of leases, that leases provide for "rentals" based not on the appraised value of the unimproved land leased but rather based on the volume of commodities passing over such lands.

14. Such throughput charges bear no relationship to the value of services rendered or benefits foregone by the State and their imposition will result in charges for the use of State lands that far exceed a rental based upon the reasonable rental value of that land. Such charges, being based on the amount of commodities in interstate or foreign commerce transported across California tide and submerged lands, constitute (a) an unlawful charge, duty or impost on imports; (b) an undue burden and unlawful charge upon interstate commerce; and, (c) an unlawful duty on tonnage.

15. (a) Plaintiff WOGA's membership includes oil companies carrying on in excess of 90% of the production, transportation, refining and marketing of crude petroleum in the Western United States and in California. Its members own and maintain crude petroleum, natural gas, and refined petroleum product pipelines located in the California tide and submerged lands which carry imported petroleum products and petroleum products in interstate commerce, and wharves, anchorages and similar facilities at which tankers are moored and over which various commodities pass, all as described above. It is not possible for said oil companies to transport said commodities into or out of California without utilizing said tide and submerged lands for the reason that, as aforesaid, said areas extend from the border of Mexico to the Oregon border. WOGA brings this action on behalf of its members for the reason, *inter alia*, that a comprehensive determination of the validity of the system established by defendants is essential. WOGA has been duly authorized to bring this action.

(a) Plaintiff Pacific Refining Company ("Pacific") is the owner of a refinery in Contra Costa County, California. Pacific acquired said refinery, formally owned by Sequoia Refining Corporation ("Sequoia") in 1976. Said refinery is served by facilities, at which vessels are moored and loaded and unloaded in interstate and foreign commerce, located on land under lease from the State of California. Said lease was originally issued to Sequoia and contained a clause forbidding assignment without the consent of the SLC. Defendants required Pacific to agree to a throughput charge based upon the amount of products going through said facilities as a condition to their consent to the assignment of the lease on said land. Pacific was compelled under protest to agree to such charges in order to be able to receive and ship cargoes without which it could not operate its refinery. Said charges cannot be precisely determined

but will probably exceed $75,000.00 per year, which amount far exceeds the reasonable rental value of the land under lease.

(c) Plaintiff Union Oil Company of California ("Union") holds leases administered by the State Lands Commission at various points in California, and will, in the ordinary course of business, continue to require such leases for importation of crude oil for use in its refineries, and for the transportation in interstate and foreign commerce of crude and refined petroleum. Union is currently discussing renewal of its lease for wharf facilities serving its San Francisco refinery. The State Lands Commission is demanding a rental under said lease based upon the amount of crude or refined petroleum crossing the leased areas. The charges being demanded will be imposed upon interstate and foreign commerce, including imports, and, while the exact amount thereof cannot be precisely determined, they will probably exceed $150,000.00 per year, which amount far exceeds the reasonable rental value of the land under lease.

(d) Plaintiff Lion Oil Company holds a lease administered by the SLC on which it has located wharf facilities used to transport coke and other commodities substantially all of which is in interstate and foreign commerce. In March of 1976 said lease was renewed for a 10-year period and amended to, among other things, fix an annual rental on said lease in the amount of $9,266.40. Said rental figure, as reflected in the Minutes of the SLC, was viewed by the SLC as the fair rental value of such property. Said renewal and amendment further provided, at the SLC's insistence, that the State could reset the rental on said lease at any time prior to February 28, 1977, to conform with any changes or additions to the SLC's rental regulations as might be promulgated. Pursuant to letter dated July 29, 1976, the SLC has demanded a throughput charge on said lease in the amount of five (5) cents per ton of any and all bulk commodities passing over the wharf. Said letter further de-

mands a minimum annual rental of $9,266.40. The effect of the throughput charge demanded by the SLC will, based on past experience, increase the rental on said lease in an amount two to three times that which the SLC has previously determined, only a few months prior to its July, 1976, letter, as the fair rental value on such property.

(e) Plaintiffs Atlantic Richfield Company, Edgington Oil Company, Exxon Corporation, Getty Oil Company, Shell Oil Company, and Standard Oil Company of California each hold leases from the State of California administered by the State Lands Commission. Said leases will come up for renewal at various times in the future, within the next few months to few years. As each of those leases matures, the State Lands Commission proposes to require a throughput charge which will apply to imports and to interstate and foreign commerce as to each of said leases. The amounts involved are many millions of dollars per year and will far exceed the reasonable rental value of such lands. In each instance, such facilities are essential to the operation of refineries, terminals and other basic parts of plaintiffs' businesses.

16. As a result of the implementation of these regulations, members of plaintiff WOGA, including the other plaintiffs herein, are being forced, and will continue to be forced, due to the virtual monopoly exercised by the State on the lands subject to such leases, to pay said unlawful charges to the State.

17. Plaintiffs have exhausted all their administrative remedies.

18. Plaintiffs have no plain, speedy and adequate remedy at law. The enforcement of this regulation, unless enjoined, will force WOGA members, including the other plaintiffs herein, to enter into leases containing unlawful throughput charges and to pay unlawful charges in the amounts of millions of dollars per year, no part of which may ever be recovered.

Second Claim
(Pendent Jurisdiction)

19. Plaintiffs incorporate herein by reference paragraphs 1 through 18, inclusive, of the First Claim herein.

20. Those wishing to lease lands owned by the State must apply to the SLC for such a lease. Upon receipt of such an application to lease State lands the SLC is directed by § 6503 of the California Public Resources Code to "appraise the lands and fix the annual rental or other consideration therefor . . . ." Under this section the rental to be charged for any particular lease must be based on the appraised value of the land leased.

21. Under the law of the State of California the SLC, in adopting regulations, is required not to act in an unreasonable, arbitrary, capricious or discriminatory manner.

22. The above-referenced regulations, in allowing for rentals on a throughput basis, are in excess of the authority of the SLC, and the other defendants herein, and are invalid under the laws of the State of California for the following reasons:

(a) Pursuant to such regulations the "rental" to be charged for the use of State lands is based not on the appraised value of that land, as required by Public Resources Code § 6503, but rather on the volume of commodities passing over such land, which volume is in no way related to the value of such land, *i.e.*, neither the value of the land nor the burden imposed on the land is in any way changed by reason of differences in the volume of commodities passing over such lands via pipeline or otherwise; and,

(b) They are unreasonable, arbitrary and capricious in that (1) they represent an effort by the SLC to extract exorbitantly high charges for the use of State lands, as compared to the value of that land, by trading on the virtual monopoly position occupied by the State over such lands,

and (2) they allow for discriminatory and unequal treatment of lessees in that rentals charged on leases of substantially identical amounts of land in the same general location will be allowed to vary greatly depending on factors, *i.e.*, the volume of commodities passing over such lands, which are in no way related to the value of that land or to services rendered by the State.

Third Claim
(Declaratory Relief)

23. Plaintiffs incorporate herein by reference paragraphs 1 through 18 of the First Claim and paragraphs 20 through 22 of the Second Claim.

24. An actual controversy has arisen and now exists between plaintiffs and defendants concerning the validity of the SLC's throughput rental regulations. Defendants assert that such regulations are valid and lawful and plaintiffs assert them to be invalid and unlawful. Plaintiffs are entitled to a judicial declaration regarding the validity of these regulations.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid;

2. For a preliminary and permanent injunction against defendants', and each of them, enforcement of such regulations, Exhibit "A" hereto, and specifically prohibiting their demanding and collecting rentals pursuant to such regulations;

3. For costs of suit herein; and,

4. For such other relief as the Court deems appropriate.

Dated: September 23, 1976.

Ingoglia, Marskey & Kearney

McCutchen, Black, Verleger & Shea
Philip K. Verleger
David A. Destino
Donna R. Black

/s/ David A. Destino
Attorneys for Plaintiffs

[Exhibit "A" omitted in printing. For text of regulations as originally amended, see J.S. App. H, p. A-38. For current text of regulations, see J.S. App. G, p. A-29.]

United States District Court
Eastern District of California

[Title omitted in printing]

[Filed Nov. 26, 1980]

NOTICE OF MOTION AND MOTION FOR RENEWED SUMMARY JUDGMENT

To Defendants and to Their Attorneys of Record:

Please Take Notice that on Monday, January 5, 1981 at 10 a.m., in Courtroom 2, plaintiffs will renew their motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is made on the grounds that certain regulations adopted by the State Lands Commission, codified in 2 California Administrative Code § 2005, violate the Federal Constitutional provisions against imposing imposts or duties on imports or exports (Constitution, Article 1, § 10, Clause 2); that the regulations violate the Commerce Clause (Article 1, § 8, Clause 3); and, that the regulations violate the Federal Constitutional prohibition against assessing a Duty of Tonnage (Article 1, § 10, Clause 3).

Plaintiffs filed a Motion for Summary Judgment before this court on December 10, 1976. Defendants moved for a Stay of Action Under the Doctrine of Abstention. After briefing and argument, the court signed an order dated May 17, 1977, staying further proceedings in this action:

> "... under the doctrine of abstention until a subsequent action to be filed by plaintiffs in the State court determines the issues of State law presented in this action and becomes final."

A copy of the court's Order is attached as Exhibit A to the Declaration of John P. Zaimes, filed herewith.

As stated in the Zaimes Declaration, WOGA filed an action in the Superior Court, entitled *Western Oil and Gas Assn. v. California State Lands Comm.*, Sup. Ct. No. 267822, 3 Civ. 18577 on appeal. The trial court entered a judgment against WOGA on cross-motions for summary judgment. The Court of Appeal for the Third Appellate District affirmed the judgment by opinion dated May 8, 1930, 105 Cal. App. 3d 554. The California Supreme Court denied a Petition for Hearing by order dated July 2, 1980. A copy of the California Supreme Court's Order is attached to the Zaimes Declaration as Exhibit B. Thus, the summary judgment motion is properly before this court.

This motion is supported by the Memorandum of Points and Authorities and declarations filed herewith and by the entire file herein.

Dated: November 21, 1980

Respectfully submitted,

McCutchen, Black, Verleger & Shea
Philip K. Verleger
Betty-Jane Kirwan
John P. Zaimes

By /s/ Betty-Jane Kirwan
Attorneys for Defendants
Western Oil and Gas Association

[Proof of service by mail omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF WILBUR H. COTREL IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Wilbur H. Cotrel, declare:

1. I am the same Wilbur H. Cotrel who filed an affidavit in this proceeding, dated November 19, 1976, a copy of which is attached hereto as Exhibit 1. I am the Manager of Property Services in the Union Real Estate Division of Union Oil Company of California ("Union"), and have responsibility for the supervision and administration of rights of way and leases for various operating facilities of the Company, including certain of its leases from the State of California.

2. Union presently owns and operates a wharf and pipelines located on tide and submerged lands in Contra Costa County owned by the State of California, which tide and submerged lands are leased from the State Lands Commission ("SLC") under a lease designated as Lease No. P.R.C. 600.1. True copies of this lease and subsequent amendments and renewals to it are attached in Exhibit 2 as follows:

Exhibit 2(A)—Lease commencing April 6, 1951.

Exhibit 2(B)—Amendment to Lease dated August 29, 1951.

Exhibit 2(C)—Amendment to Lease No. P.R.C. 600.1 dated April 6, 1954.

Exhibit 2(D)—Modification to Lease No. P.R.C. 600.1 dated March 24, 1960.

Exhibit 2(E)—Lease Renewal and Amendment to P.R.C. 600.1 dated October 22, 1971.

Exhibit 2(F)—Renewal and Amendment to Lease P.R.C. 600.1 dated August 8, 1978.

3. The land leased from the State of California is totally undeveloped tide and submerged land. The State of California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Union. In order to make this unimproved land usable, Union invested approximately $5,200,000 to construct a wharf and pipelines. In order to continue to use these improvements, Union must, at its own expense, maintain the facilities and dredge the submerged lands. As one example, Union spent approximately $292,000 in 1978 for dredging alone.

4. Union made these substantial investments on the land leased from the state and continues to properly maintain these improvements at great expense to enable Union to transport crude oil and refined product to and from its refinery. The Union refinery is located on approximately 1,112 acres of land owned by Union in fee and adjacent to the state's land. Union has invested in excess of $219,000,000 in the refinery. To operate the refinery, Union must cross the leased lands: there is no other means available to Union to transfer crude oil and commodities between the refinery and tankers moored at sea.

5. From 1951 until the adoption of the volumetric rental regulations in 1976, the practice of the SLC was to collect a rental from Union based on a reasonable rate of return on the appraised value of the leased land. Union's lease, Lease No. P.R.C. 600.1, provided that all renewals would be on "reasonable" terms, which Union believes to be the fair market rate of return on the appraised value of the leased land.

6. The last prior renewal of Lease No. P.R.C. 600.1 expired on April 5, 1976. Union made an application for a

10-year extension of the lease on November 6, 1975. The SLC proposed its terms for renewal in a letter dated June 29, 1976. (A copy of that letter is attached as Exhibit A to my previous affidavit, Exhibit 1 hereto.) This letter announces the SLC's intention to insist on the imposition of a volumetric rental. Union renewed its lease on this basis solely because of the tremendous investment that it had made on the land leased from the state on the adjacent land owned by Union.

7. Under the renewed lease the rent to be paid is calculated as follows. First, the SLC appraised the value of the land to be leased and calculated an 8% return on the appraised value. This amount, formerly the maximum rent, became the minimum annual rent in the amount of $41,000 per year for the first five years, and $50,000 per year for the remaining five years.

8. In addition, the SLC applied a per barrel rent based on the total throughput of commodities passing across the leased land. During the first four lease years under the renewed lease (April 1, 1976 through March 31, 1980), this per barrel rent has resulted in an average annual charge, over and above the minimum annual rent, of approximately $49,000. Based on the State's appraised value of the leased parcels, this has given the SLC an average annual net rate of return of approximately 18% during the aforementioned four lease years. Based on present projections of total throughput of commodities passing across the leased land during the remaining six years under the renewed lease, the annual charge over the minimum rent will be approximately $53,000 during the current lease year and $67,000 during each of the remaining five lease years. This will result in an annual net rate of return for the SLC of 18% for the current lease year and 23% for each of the remaining five lease years.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined product that crosses the state's land is subject to this charge. All of said crude imports come from places outside the State of California. Currently, approximately 49% of the finished and unfinished refined petroleum products leaving said refinery are destined for places outside of California.

I know the above from my own personal knowledge and could competently testify thereto.

Dated at Los Angeles, California, this 7th day of November, 1980.

/s/Wilbur H. Cotrel

Exhibit 1

Affidavit of Wilbur H. Cotrel

County of Los Angeles
State of California

Wilbur H. Cotrel, being first duly sworn, deposes and says:

1. I am Manager Property Services, in the Union Real Estate Division of Union Oil Company of California, a corporation ("Union"), and have responsibility for the supervision and administration of rights of way and leases for various operating facilities of the Company, including certain of its leases from the State of California.

2. Union is presently lessee under a lease entered between it and the State Lands Commission ("SLC"), designated by the SLC as lease number P.R.C. 600.1, covering state tide and submerged lands located in Contra Costa County. Said lease was originally entered in 1951, and has been renewed periodically since that date. The past practice of the SLC in fixing rentals on said lease has been to fix the amount of rent as a percentage of the appraised value of the state land.

3. The last renewal on lease number P.R.C. 600.1 expired on April 5, 1976. Application for a ten-year extension of the lease (as permitted under its provisions) was made on November 6, 1975. It was not, however, until Union received a letter from the SLC dated June 29, 1976, that the SLC proposed its terms for renewal. A copy of that letter is attached hereto as Exhibit "A".

4. Pursuant to Exhibit "A", the State has proposed a rental ranging between one-half cent and one cent per barrel of products passing over state lands, with a minimum rental in the amount of $52,640.00 per year.

5. At Union's request, the SLC has provided it with a letter explaining how it arrived at the figures set forth in Exhibit "A". By letter dated October 13, 1976, Union was informed that the $52,640.00 figure represents what the state views as an eight percent return on what it found to be the appraised value of the land. A copy of that letter is attached as Exhibit "B". That letter goes on to indicate how the SLC computed the throughput charges.

6. I know the above from my own personal knowledge and could competently testify thereto.

/s/ Wilbur H. Cotrel

Subscribed and sworn to before me
this 19th day of November, 1976.

Theresa M. Thomas

[Seal]

Exhibit A

[Letterhead]

State of California—State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814
(916) 445-7738

June 29, 1976
File Ref.: WP 600

Union Oil Company of California
Union Oil Center, Box 7600
Los Angeles, CA 90051

Attention: W. H. Cotrel, Manager,
Property Services

Gentlemen:

As you know, the Commission, at its meeting on April 28, 1976, adopted changes to its general leasing regulations; which changes provide for a rental alternative based on the volume of commodities passing over State land. Accordingly, as partial consideration for amending and renewing lease P.R.C. 600.1, we propose to charge a rental which embodies the Commission's newly-adopted leasing regulations. Staff has valued the site and would be willing to recommend a rental schedule as follows:

> Rental, based on the number of barrels (42 U.S. gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter (July 5, October 5, January 5, April 5) of the lease year (April 6 through April 5) and shall be paid as follows:
>
> $0.01 per barrel until the minimum rental is equaled. (See below for minimum annual rental.)

$0.0050 per barrel for the next 15 mmbls.

$0.0075 per barrel for each barrel thereafter.

The minimum annual rental shall be $52,640, and shall be paid in advance by Lessee on or before April 6th of each lease year.

In arriving at the above annual rental figures, staff conducted an investigation into the relative value of site occupied by the wharf and appurtenant structures. Consideration was also given to those criteria outlined in the Commission's regulations (§ 2006 (h), 2 Cal. Adm. Code, Article 2). Primarily, an attempt was made to relate the utility and value of the State's land to those unimproved water-covered areas in various ports and harbors in California.

In arriving at a value for the State's land, consideration was given to the various methods of valuing water-covered port lands. This included examination of existing port tariff schedules, analysis of port leases and preferential berth assignment agreements, interviews with knowledgeable port personnel, including in each instance, the designated port property manager. Consideration was also given to site peculiarities, adjacent land values and other comparable or related data.

In addition to the change in rental, appropriate changes to the lease will be made to provide for the periodic payment of the volumetric rental, and provisions for reporting and auditing of statements by Division staff will be added.

It is our belief that the volumetric rental proposed herein provides a fair and reasonable return to the State for use of the public's land. We would be pleased to discuss with you any questions you may have on the proposed volumetric rental charges.

Very truly yours,

/s/G. R. Horn
Land Agent

Exhibit B

[Letterhead]

State of California--State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814
(916) 445-7738

October 13, 1976
File Ref.: WP 600

Union Oil Company of California
Union Oil Center, Box 7600
Los Angeles, CA 90051
Attention: W. H. Cotrel, Manager
Property Services

Gentlemen:

Proposed Volumetric Rental—Oleum Wharf Site

Below, I will attempt to relate to you the methodology used in setting the rental that was proposed to you in my June 29th letter. Included will be a breakdown in the areas and values used in computing the minimum annual rental, and the concepts and rationale behind the volumetric rental.

Below is a breakdown of the lease area:

Lease Parcels:

Parcel 1 (filled tidelands) 3.68 ac. at $.60 sq. ft.	
Parcel 2	7.401
Parcel 3	4.088
Parcel 4	0.712
Parcel 5	0.690
	12.891

Ac. at $1.00 sq. ft.

Note: Parcel 6 (Intake line) not included in this appraisal.

Therefore: 3.68 ac. at $.60 rounded	96,000
12.891 ac. at $1.00 rounded	562,000
	658,000
Rent at 8% x 658,000	$ 52,640

Basis for Valuation:

Parcel 1: Value $26,000 per acre or $0.60 per square foot.

Filled tidelands adjacent to deep-water channel; value based on regional industrial land sales—adjusted for the particular characteristics of this site. Conventional appraisal procedures were used to arrive at this value, supplemented by analysis of existing State Lands leases.

Parcels 2 through 5: Value $43,560 per acre or $1.00 per square foot.

These are submerged lands on a deep-water channel fully capable of supporting international water-borne commerce. The method of valuation used was to compare the State submerged lands with existing port facilities of the Bay area—specifically that of the Port of Richmond. We (and the Attorney General's appraisal consultant) believe that the leased parcels (2 through 5) supply Union with a "wet water" use comparable to that of a port. Without use of the State's land, a prospective lessee would have to arrange a facility in the closest port.

The appraiser examined Port of Richmond leases and discussed the value of wet berthing areas with the Port Director. Based on this information, a value somewhat less than $1.00 per square foot was assigned to the State's land in a benchmark appraisal. The appraiser examined the leases and the "preferential berth assignment" agreements of the various ports and found that the lease rights granted are similar to what the State grants its lessees.

The State leases property rights to Union to construct and maintain a pier with necessary appurtenant pipelines, for the loading/unloading of bulk petroleum products. These rights are let for relatively long periods of time (up to 49 years).

The consultant (with our concurrence) believes the best comparability for the lease area (State lands) lies in the similarity in utility provided by the ports in their leases and preferential berth assignments for the loading and unloading of merchandise. Accordingly, since the appraiser found a rent value of "wet lands" in Ports ranging from $.92 to $1.00 (including the Port of Richmond—nearest comparable) he assigned a value of nearly $1.00 per square foot for the State's land. We have used this unit value in arriving at the total value for parcels 2 through 5. I am attaching a list of some of the agreements the appraisal consultant and Division staff appraisers have examined in the various ports in both northern and southern California. Additional information concerning these agreements may be obtained by examination of file working papers on the agreements, discussion of the agreement provisions with knowledgeable port officials (generally the port property manager), and obtaining from the port accounting office a listing of actual rents paid per the wharfage schedule.

Some of these agreements will not show a breakdown between dry (filled) land and water-covered lands, therefore, it becomes a question of how to allocate the value between the dry and wet lands. If one were to follow the May, 1974 Main Lafrentz & Co. study for the California Association of Port Authorities (updated version of the Freas report on valuation of Port Lands and derivation of wharfage charges), the value to water-covered port land is calculated as follows: Using conventional appraisal techniques, the adjacent dry port lands are valued. The water-covered area is then added to the total dry land area; the value of the dry land area is then ascribed to the total area (dry and water-covered lands). When you apply this approach to the lease agreements of the ports, the results will show that generally the water-covered lands will have a unit value considerably [illegible]ter than the $1.00 per square foot we have discussed.

In addition, both the Port of Los Angeles and Port of Long Beach have, in their latest published tariff schedules, a schedule of rents for the occupation of various port properties. The schedule shows that rent for the occupation of water-covered areas (for vessels accorded free dockage) shall be one cent per square foot per month. Depending on the capitalization rate used to translate the rate into value, the unit value can range between $52,000+ per acre ($1.20 per square foot) and $65,000+ per acre ($1.50 per square foot). This schedule of rents appears to more than support our position (and that of the ports) that raw water-covered lands are at least worth $1.00 per square foot.

In arriving at the volumetric rental proposed in my June 29th letter to you, we gave consideration to those criteria set forth in the Commission's new volumetric regulations. We also considered similar agreements, i.e. City of Seal Beach agreement with Exxon; Hollister Estate agreement with Texaco and of course, existing port tariffs. These data show that other entities have charged (both directly and indirectly) on a commodity basis ranging from several mils to as much as 3.5 cents per barrel for passage of petroleum products over land. Our proposed schedule of volumetric rental falls well within this range.

Part of the rationale behind the rental schedule, as proposed, is to encourage the efficient use of the public's land by limiting their use to the minimum amount necessary. This is accomplished by charging a high initial volumetric rate until the minimum annual rent is equaled. If a lessee is occupying a large amount of State land, some of which is not being used to its highest and best use or most intense use, the lessee will be penalized by paying the higher volumetric rate for a longer period of time until the higher minimum rental is equaled. Once the minimum annual rental is equaled, the volumetric rental is reduced substantially to encourage continued high productive use of the lands.

The later rise in the volumetric rental schedule reflects the intense use of the land and the increased probability of a spill or other incident that may degrade the State's land.

We believe that this approach is sound and is not dissimilar to the method of collecting rental (wharfage) by the ports. Our experience has been that the ports enjoy an "overage" after a return "of" and return "on" their investment in the port facilities. In some cases, after the minimum rental in a port has been equaled, the wharfage rate is reduced by some given factor; however, in other instances, we have found that once the minimum annual rental is equaled the wharfage rate continues at the stated amount and often the actual payment to the port is many times the stated annual rent. A good example of this is the lease between Texaco, Inc. and the Port of Long Beach. It is our belief that a substantial portion, if not all, of this "overage" is a return to the land since the port has already obtained a return "of" and "on" its cost to construct the improvements. Accordingly, we feel that volumetric rental represents a truer measure of the relative value of the State's land which is equal or nearly equal in utility (in some cases the State's land will have greater utility—deep water 70+ feet depth MLLW) to the water-covered areas in a port.

We should be pleased to assist you in any way we can in your review of the principles we have applied in the determination of rent for the Oleum Wharf site. And, to reiterate, the volumetric rental proposed in my previous letter was not meant to be an ultimatum. It was, and still is, our opinion of a reasonable, fair rental for the subject site based on existing comparable or related data and consistent with rental practices used by other prudent land owners. However, we would be pleased to discuss with you any information you have or may generate which is germane to this discussion.

It is hoped that we can negotiate an agreed rental based on a mutual exchange of pertinent data.

Please contact me if you have any questions on this matter.

Sincerely,
/s/ G. R. HORN
G. R. HORN
Land Agent

GRN:ds
Attachments

Agreements Examined by A. G. Valuation Consultant and Division Staff Appraisers in Determining Rents for Wharf and Marine Terminal Sites

Port of Los Angeles
- Union Oil Company
- Shell Oil Company
- Standard Oil Company
- Mobil Oil Company
- Phillips Petroleum Company
- Edgington Petroleum Company
- General American Transportation Corporation (GATX)
- Japan Line (U.S.A.) Ltd., et al.
- University of So. Calif.

Port of Richmond
- Pacific Vegetable Oil Corporation
- Canal Industrial Park, Inc.
- Pacific Molasses Co.
- Dorword & Sons Co.
- Petromark—Terminal 1
- Pasha Truckaway—Shipyard
- Levin Metals—Shipyard
- Willamette Iron and Steel—Shipyard

Port of San Francisco
- Bethlehem Steel
- Pacific Far East Lines
- State Steamship
- P.G. & E. Co.

Port of Oakland
- Western Pacific
- Merritt Ship Repair
- Pacific Dry Dock
- Kaiser Steel
- Matson Terminals
- Schnitzer Steel Products

Port of Long Beach
- Texaco, Inc.
- ARCO
- Others currently under investigation

Port of San Diego
- San Diego Gas and Electric
- Others currently under investigation

In addition to the above data, other sources of information investigated were those situations involving a volumetric charge listed in the staff report on volumetric rental rates presented to the Commission on April 28, 1976 (copy attached).

Exhibit 2A

State of California
State Lands Commission
State Building
Los Angeles
54354.1

No. 600 Public Resources Code Series
5/15/51

For such consideration and specific purposes as are hereinafter set forth, and subject to such terms, conditions, reservations, restrictions and time limitations as are hereinafter set forth:

The State of California, Party of the first part, hereinafter called the State, acting through the State Lands Commission and pursuant to the authority contained in Division 6 of the Public Resources Code and the rules and regulations adopted thereunder, does hereby demise and lease for a term of fifteen (15) years, beginning April 6, 1951 to Union Oil Company of California of the County of Los Angeles, State of California, and hereinafter called the Lessee, a lease of, in, and upon those certain tide and submerged lands situate in the County of Contra Costa, State of California and more particularly described as follows, to wit:

[Property description omitted in printing]

The parties of this agreement do hereby covenant and agree as follows:

1. That the term of this agreement shall commence upon the above recited date of April 6, 1951 and shall continue thereafter (unless sooner terminated as hereinafter provided) until April 5, 1966;

2. That the Lessee shall pay to the State as consideration for the granting of this agreement, a rental sum which

shall be payable in accordance with the following schedule: (See photostat copy for correct figures)

One thousand nine hundred fifty six and seventy four one-hundredths (1956.74) dollars on April 6, 1951, being the first and last years rental under terms of this agreement less five hundred fifty two and no one hundredths (552.00) dollars credit for the unexpired nine months period under terms of lease No. 84, Public Resources Code Series terminated on April 5, 1951, and one thousand two hundred four and thirty seven one-hundredths (1204.37) dollars on April 6, 1952 and on like date of each succeeding year that this agreement remains in force; provided, however, that in the event of termination of this agreement under the provisions of paragraph 15 herein no portion of any rental, paid in advance shall be refundable.

3. That the Lessee will pay to the State the said rental consideration reserved to the State, in accordance with the schedule contained herein, to the State Lands Commission, Room 301 California State Building, 217 West First Street, Los Angeles 12, California, without deduction, default or delay; and, in the event of failure of the Lessee so to do, or in the event of a breach of any of the other covenants contained within this agreement, or failure to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for the State to re-enter into and upon the demised premises, and to remove all persons and property therefrom, and to re-possess and enjoy the herein described demised premises as in the first and former estate of the State, anything to the contrary herein contained notwithstanding;

4. That the described land shall be used during the terms hereof only for lawful commercial purposes, the maintenance and operation of a filled area and wharf for purposes incident to the operation of the Lessees refinery adjacent thereto.

5. That construction of facilities to be installed on the described land shall be started not later than ..... and completed not later than .....;

6. That the Lessee shall not transfer nor assign this agreement and shall not sublet said land nor any part thereof, except upon the prior written consent of the State first had and obtained;

7. That the State expressly reserves the right to grant easement or crossings, in, upon and under the demised premises, and nothing herein contained shall be construed as limiting the powers of the State to lease, convey, or otherwise transfer or encumber, during the life of this agreement, the hereinbefore described State lands for any purpose whatsover not inconsistent or incompatible with the rights or privileges granted to the Lessee by this agreement;

8. That the Lessee shall maintain and keep in good sound repair, all structures, facilities or appurtenances upon the property and that no substantial alterations to existing structures or creation of new structures or removal of any structure shall be undertaken without the prior written permission of the State first had and obtained;

9. That the Lessee shall be liable for and agrees to indemnify the State against any loss, damage, claim, demand or action, caused by, arising out of, or connected with the construction or maintenance of structures upon, or the use by the Lessee and/or agents thereof, of the demised premises;

10. That the Lessee shall observe and comply with all rules and regulations now promulgated by any agency of the State of California having jurisdiction therein and such reasonable rules and regulations as may hereafter be promulgated by any agency of the State of California having jurisdiction therein; and the Lessee shall at all

times take suitable precautions to prevent pollution and contamination of waters of San Pablo Bay;

11. That the State, through its authorized agents, shall have the right at all reasonable times to go upon the demised premises for the purpose of inspecting the same;

12. That there is reserved to the State all natural resources, timber and minerals, including oil or gas in or upon the described land and the right to grant in, over and across said land, leases, easements and/or rights-of-way to extract or remove such natural resources, timber or minerals as provided by law and the rules and regulations of the State Lands Commission and without compensation to the Lessee;

13. That the Lessee shall file with the State and maintain in full force and effect at all times during the term of this lease or any extension thereof, and the additional period of ninety (90) days referred to in Paragraph 14 hereof, a good and sufficient surety bond drawn in favor of the State of California in the penal sum of thirty five thousand (35,000) dollars, to guarantee to the State the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in Paragraphs 4 to 17, inclusive, of this agreement, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee;

14. That the following specifically enumerated and described structures, buildings, pipe lines, machinery and facilities placed or erected by Lessee or existing and located upon said demised premises shall become and remain the property of the State upon expiration or earlier termination of this agreement:

all fill heretofore or hereafter placed on Parcel No. 1 described in this agreement.

All other structures, buildings, pipe lines, machinery and facilities placed or erected by Lessee or existing and lo-

cated upon said demised premises shall be salvaged and removed by Lessee, at Lessee's sole expense and risk, within ninety (90) days after the expiration of the period of this agreement or prior to any sooner termination of this agreement; and Lessee in so doing shall restore said demised premises as nearly as possible to the condition existing prior to the erection or placing of the structures, buildings, pipe lines, machinery and facilities so removed;

15. That the Lessee may terminate this agreement upon sixty (60) days notice of such termination to the State; provided, however, that no such termination shall become effective, and the Lessee shall be fully liable for rent and for the performance of all other obligations on the part of the Lessee, until said Lessee has fully complied with and has consummated each and all of the provisions of Paragraphs 14 and 16 hereof;

16. That the Lessee will, on the last day of said term or sooner termination of this agreement, peaceably and quietly leave, surrender and yield up to the State, all and singular, the demised premises in good order, condition and repair, reasonable use and wear thereof and damage by act of God or the elements excepted; and execute and deliver to State a good and sufficient quitclaim deed to the rights arising hereunder. Should Lessee fail or refuse to deliver to the State a quitclaim deed as aforesaid, a written notice by the State reciting the failure or refusal of the Lessee to execute and deliver said quitclaim deed as herein provided shall from the date of recordation of said notice be conclusive evidence against Lessee and all persons claiming under Lessee of the termination of this agreement;

17. That all notices herein provided to be given shall be deemed to have been fully given when made in writing and deposited in the United States mail, registered and postage prepaid, addressed as follows:

To the State:
State Lands Commission,
Room 301,
California State Building,
217 West First Street,
Los Angeles 12, California.

To the Lessee:
Union Oil Company of California
Union Oil Building
Los Angeles 17, California

The address to which the notices shall be mailed as aforesaid may be changed by written notice as herein provided; but nothing herein contained shall preclude the giving of any such notice by personal service;

18. That time is the essence of each and all the terms and provisions of this agreement, and the terms and provisions of this agreement shall extend to and be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto; if more than one Lessee is named herein the obligations of said parties herein contained shall be joint and several;

19. This agreement may be terminated or the provisions changed, altered or amended by mutual consent of the parties;

20. That the Lessee or the heirs and assigns of, or any successor in interests thereto, shall have the right to renew this agreement for two additional periods of ten (10) years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose.

IN WITNESS WHEREOF, The parties hereto have caused this agreement to be executed this 15 day of May, 1951.

[Subscriptions omitted in printing]

Exhibit 2F

State of California
State Lands Commission

Renewal and Amendment of Lease PRC 600.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor, and Union Oil Company of California, as Lessee, made and entered into a Lease Agreement, designated lease PRC 600.1, covering certain filled and unfilled tidelands and submerged lands situate in Contra Costa County, which lease was issued May 15, 1951 by the State for a period of fifteen years commencing April 6, 1951; and

Whereas, said lease was amended by instrument dated August 29, 1951; and

Whereas, said Lease was amended by instrument dated April 6, 1954; and

Whereas, said Lease altered by instrument dated March 24, 1960; and

Whereas, said Lease was renewed and amended by instrument dated October 22, 1971; which renewal and amendment relates back to April 6, 1966; and

Whereas, by terms of said Lease PRC 600.1, Paragraph 20, Lessee was granted the right of renewal for two additional periods of ten years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose; and

Whereas, Lessee had previously exercised its right of renewal for the first period of ten years and has now formally exercised its last remaining right of renewal of Lease PRC 600.1 for a period of ten years, upon the terms and conditions as hereinafter provided;

Now therefore, it is agreed by and between the parties hereto as follows:

1. Lease PRC 600.1 is hereby renewed for a period of ten (10) years beginning April 1, 1976 and ending March 31, 1986.

2. *Amendment of Description of Demised Premises.* The land description presently contained in Lease PRC 600.1 as subsequently amended is hereby deleted in its entirety and there is substituted therefor that description shown as Exhibit "A" dated February 5, 1976, and revised March 31, 1978, attached hereto and by reference made a part hereof.

3. *Annual Rental:* Effective April 1, 1976, Paragraph 2 and 3 of original Lease PRC 600.1 and subsequent recitals of annual rental amounts are deleted and the following substituted therefor:

"2. Monetary Consideration: Commencing on April 1, 1976, and continuing through March 31, 1981, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U.S. Gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter of the lease year and shall be paid on or before the last day of the following month as follows:

(a) Until the minimum annual rental provided for in subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the

State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 7,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and thereafter $0.006 (6 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) *Minimum Annual Rental:* The minimum annual rental for each lease year shall be $41,000 and shall be due and payable on or before the first day of such lease year; provided, however, that the minimum annual rental for the lease years commencing April 1, 1976, April 1, 1977 and April 1, 1978 shall be due and payable (without interest) upon execution and delivery of this Renewal and Amendment of Lease PRC 600.1 and Lessee shall be allowed as a credit thereto the sum of $41,040.00 heretofore paid on account thereof. In each lease year the minimum annual rental shall be applied against the annual rental computed in 3(a) and 3(b) above.

(d) Rental shall not be imposed for passage of a commodity over the State's land if rental has already accrued on that identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are *not* identical to crude oil include, but are not limited to: fuel oils, diesel oils, gasoline, petrochem-

icals, kerosenes, jet fuels, naptha and other middle distillates.

(e) Rental based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall *not* accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands.

(f) Lessee shall, with each quarterly rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor, signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the demised premises. Lessee shall maintain for audit of such statements and shall furnish on thirty days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets and other pertinent documents, sufficient to determine the nature, quantity, origin/destination and ownership of commodities so received or shipped. Such source documents shall be maintained for a period of at least five years after their preparation.

(g) The annual rental provided for herein shall be paid to Lessor without deduction, delay or offset, at such place as may be designated by Lessor, and at the times specified herein. In the event of the termination of the Lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

4. *Annual Rental for Second Five Years of Extended Term.* For the period beginning April 1, 1981 and ending March 31, 1986 (herein called the "Second Five-Year Period"), annual rental shall be paid as follows:

(a) Until the minimum annual rental provided for in paragraph 4(c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the

number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 10,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof: and thereafter $0.005 (5 mils) per barrel for next 20,000,000 barrels of such commodities passing over the State's land in that same lease year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) Minimum annual rental "Second Five-Year Period": The minimum annual rental for each lease year beginning April 1, 1981 shall be $50,000 and shall be due and payable on or before the first day of such lease year. In each lease year the minimum annual rental shall be applied against the annual rental computed in 4(a) and 4(b) above.

5. *Holding Over and Late Payments.*

(a) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of this lease renewal agreed to herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive rentals, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be con-

strued as a limitation upon any other remedy which the State may have against a hold over Lessee.

(b) It is agreed by the parties hereto that any rentals accruing under the provisions of this renewal and amendment that shall not be paid when due shall bear interest from the date when the same was payable by the terms hereof at the rate specified in Public Resource Code Section 6224, until the same shall be paid by the Lessee.

(c) The failure to pay rentals when due shall also subject the Lessee to penalty of ten (10) percent of each delinquent rental payment.

(d) It is agreed by the parties hereto that the interest and penalty provisions referenced in (a), (b) and (c) above shall not apply to volumetric rental due and for the lease years beginning April 1, 1976 and April 1, 1977.

6. Lessor reserves the right to periodically inspect the leased land and improvements located thereon to insure that Lessee's improvements comply with applicable State and Federal regulations.

7. Paragraphs 9 and 13 of said Lease PRC 600.1 as amended, are hereby deleted and the following substituted therefor:

"9. Indemnity, Bond and Insurance:

(a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California, its officers, agents and employees against any and all claims, demands, loss, action or liability of any kind which State of California, or any of its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them arising out of or connected with the issuance of this amended lease, including, without in any way limiting the generality

of the foregoing, any claim, demand, loss, or liability arising from any failure of title or any alleged violations of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease renewal, and an additional period of one hundred twenty (120) days or until the State has accepted a quitclaim deed and sufficient evidence of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of Fifty Thousand Dollars ($50,000.00), to guarantee to Lessor the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in this amended lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his expense and keep in full force and effect during the term of this lease, for the protection of Lessee and the State in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and the surrounding area with limits of not less than $1,000,000 for bodily injury and $5,000,000 for property damage. The policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that liability insurance coverage herein provided for shall be in effect at all times during the term of this lease, and until said leased land is restored as nearly as possible to the condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept

the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased lands as then improved, Lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the condition existing prior to the erection and placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the term of this amended lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than one (1) year, and until the leased land is restored as nearly as possible to the condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the State Lands Commission, and Lessee agrees that no construction, improvements, additions, work or services shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insurance coverage as herein provided, State may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

9. *Oil Spill Emergency.* In the event of a spill or leak of oil or other liquid pollutants into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services via the toll-free 24-hour service telephone number 1-800-852-7550. For spills of 10 barrels or more, Lessee shall report directly to the State Lands Commission 24-hour service telephone

number (213) 590-5201. Information to be reported shall include, but not be limited to:

> The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the water body affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and the action taken.

10. *Marine Terminal/Wharf Operations.* Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State regulations and guidelines covering Lessee's operations on and about the demised premises. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

11. *Repossession.* In the event of failure of Lessee to pay rental, or in the event of a breach of any of the other covenants contained within the lease, as herein amended, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom and to repossess and enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period and to diligently pursue to conclusion the actions necessary to cure such default, and, so long as such default is cured within such prescribed time limits, Lessor shall not repossess the demised premises as provided herein.

12. *Possessory Interest.* Lessee recognizes and understands in accepting this lease renewal and amendment that the interest created therein may be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and paid by the Lessee.

13. *Reservation of Rights.* Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in paragraphs 3 and 4 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being *Western Oil and Gas Association, et al. v. Cory, et al.,* U.S.D.C. (E.D. Cal.), No. CIV S-76-513 and *Western Oil and Gas Association, et al. v. California State Lands Commission,* Sacramento Superior Court No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of the minimum annual rental specified in Subparagraphs 3(c) and 4(c) hereof, in an interest-bearing Special Deposit Account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee, subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the Special Deposit Account. Notwithstanding the foregoing, in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Subparagraphs 3(c) and 4(c) hereof, it being expressly acknowledged by Lessee that annual rental in that fixed

amount is reasonable and within Lessor's statutory authority. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered, under paragraph 20 of the Lease, to impose a reasonable rental for the lease period commencing April 1, 1976.

All other terms and conditions of Lease PRC 600.1 shall remain in full force and effect.

The effective date of this Renewal and Amendment shall be and is April 1, 1976. This agreement will become binding on the Lessor only when duly executed on the behalf of the State Lands Commission of the State of California.

In Witness Whereof, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated August 8, 1978]

[Miscellaneous approvals and certifications and property description omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

SUPPLEMENTAL DECLARATION OF KENNETH T. PALMER IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Kenneth T. Palmer, declare:

1. I am the same Kenneth T. Palmer who filed an affidavit in this proceeding, dated December 3, 1976, a copy of which is annexed as Exhibit 1 hereto. I am presently employed by Pacific Refining Company ("Pacific") as the Vice President/Refinery Manager for Pacific's refinery located in Hercules, California. As Refinery Manager, I am responsible for and am familiar with all operations at the refinery, including receipt of crude oil and shipment of petroleum products. I am also fully familiar with the operation of facilities located in San Pablo Bay on land leased from the State of California.

2. Pacific presently owns and operates a wharf and pipeline facilities in the San Pablo Bay located on tide and submerged land owned by the State of California, leased by the State Lands Commission ("SLC"), and designated Lease No. P.R.C. 3414.1. A true copy of this lease is attached as Exhibit A to my affidavit, Exhibit 1 hereto.

3. The land leased from the State of California in San Pablo Bay is totally undeveloped tide and submerged land. The only improvements to this land have been made by Pacific or Pacific's predecessors in interest at a cost of approximately $1,500,000. In addition, a major marine accident in 1978 resulted in wharf repair costs of approximately $750,000. The State of California has never provided any services in connection with the maintenance or operation of the wharf or pipeline facilities constructed by its lessees.

In order to continue the use of these improvements, Pacific is required, at its own expense, to fully maintain the facilities and dredge the submerged lands. As an example, the cost of dredging operations in 1979 alone was approximately $200,000.

4. Pacific made these substantial investments in a wharf and pipelines and continues to properly maintain these improvements at great expense because without these facilities the refinery would have to be shut down since it could not receive adequate supplies of crude oil to run the refinery. The Hercules refinery is adjacent to the state's land on approximately 100 acres of land owned in fee by Pacific. Pacific has invested approximately $43,000,000 in the Hercules refinery. To operate the refinery, it is indispensable that Pacific be able to cross the leased land: There is simply no other means available to Pacific to transfer the needed amount of crude oil and other commodities between the refinery and vessels at sea.

5. I attach hereto as Exhibit 2 the Affidavit of Clinton B. Fawcett, dated December 3, 1976, and filed previously in this proceeding. Mr. Fawcett was then Vice President of Pacific. He describes the April 1, 1976 acquisition by Pacific of the Hercules refinery and all assets used in its operation. Among those assets was the lease from the State of California that I have previously mentioned, Lease No. P.R.C. 3414.1. In order to obtain the required approval of the SLC for the assignment of this lease, Pacific was forced to consent to a volumetric rental rate for the use of the state's land. Pacific agreed to these terms solely because of the tremendous investment it had just made in purchasing the Hercules refinery and the facilities on the state's land in San Pablo Bay.

6. Since the assignment of this lease to Pacific, the SLC has calculated the rental to be collected as follows. First, there is a minimum annual rental of $32,500 which is the sum of $6,600 for the land crossed by the pipeline facilities

(computed at the rate of one and one-half cents per diameter inch per lineal foot, plus $25,000 for the land under and around the wharf (computed at the rate of 8% per annum of the appraised value of said land, rounded to the nearest $100).

7. In addition, the SLC insisted that there be a throughput charge. A minimum annual rental of $32,500 is due on or about the twentieth day after November 17 of each lease year. The throughput charge is $0.01 per barrel until the minimum annual rental payment has been equalled (3,250,000 barrels × $.01 = $32,500). Then, the throughput charge is as follows:

$0.001 per barrel for the next 7,000,000 barrels

$0.003 per barrel for the next 20,000,000 barrels

$0.006 per barrel for the next 20,000,000 barrels

$0.009 per barrel for each additional barrel

The total lease year rental for this parcel of tide and submerged land is:

Lease Period	$
November 18, 1976—November 17, 1977	94,919
November 18, 1977—November 17, 1978	105,738
November 18, 1978—November 17, 1979	104,053
November 18, 1979—August 17, 1980 (9 Months)	60,777

Based on the SLC's appraisal of the leased land, the state will receive an annual rate of return on its unimproved land of 28% for 1976-1977, 29% for 1977-1978 and 29% for 1978-1979.

8. This additional throughout charge is solely for the privilege of crossing the state's land. During my employment at the Hercules refinery for the lease years 1976 through 1979, 97.8% of the crude oil received by Pacific has been from foreign sources. The foreign source crude oil has been carried in oceangoing tankers, traversed international waters, and traveled in foreign commerce. Over

99% of the domestic crude oil has been carried to the refinery in oceangoing tankers, traversed international waters and traveled in interstate commerce. The crude oil is then transferred from these vessels to the refinery by means of the wharf and pipelines of San Pablo Bay.

In addition, cargoes of petroleum products are regularly shipped from and are occasionally received at the refinery by Pacific. These products are transferred between oceangoing tankers or barges and the refinery by means of the wharf and pipelines. During each voyage to or from the refinery, the oceangoing tankers and barges have carried petroleum products across the navigable waters of the United States and the oceangoing tankers have carried said products across international waters.

If I were called as a witness in the above proceedings, I would testify to the above facts under oath, and I declare under penalty or perjury that the foregoing facts are true and correct.

Dated at Hercules, California, this 29th day of October, 1980.

/s/ Kenneth T. Palmer

Exhibit 1

Affidavit of Kenneth T. Palmer

State of California
City and
County of San Francisco
ss.

I, Kenneth T. Palmer, being first duly sworn, depose and say:

1. I have personal and firsthand knowledge of the matters testified to in this affidavit and am competent to testify to the following:

2. I am presently employed by Pacific Refining Company ("Pacific") in the position of Refinery Manager at Pacific's refinery in Hercules, California ("the refinery"). As Refinery Manager I am responsible for and am familiar with all of the operations at the refinery, including receipt and refining of crude oil and shipment of petroleum products. I was first employed by Pacific in this capacity on March 10, 1976. Since April 1, 1970, I have been employed continuously at the refinery, first as Manager of Engineering for Sequoia Refining Corporation ("Sequoia") and thereafter as Manager of Engineering and then Operations Manager for Gulf Oil Company ("Gulf").

3. As part of my duties for Pacific and earlier for Gulf and Sequoia, I am and have been fully familiar with the operations of the wharf and pipeline facilities located on and crossing tide and submerged lands in San Pablo Bay. The land upon which these facilities were constructed was leased from the State of California pursuant to Lease P.R.C. 3414.1. A copy of the Lease Agreement is attached hereto as Exhibit A. The wharf and pipelines are at the locations shown on the map attached hereto as Exhibit B. The wharf, which is entirely surrounded by the navigable waters of San Pablo Bay, and the pipeline facilities were constructed by Sequoia and Gulf with no contribution being

made by the State of California. The State of California has never provided any services in connection with the maintenance or operation of the wharf or pipeline facilities. Pacific now is, as were Gulf and Sequoia, totally dependent upon the above-mentioned wharf and pipelines as the sole means for transporting crude oil to and certain petroleum products from the refinery. Without these facilities the refinery would have to be shut down since it could not be supplied with crude oil.

3. During my employment at the refinery by Sequoia, Gulf and Pacific, all crude oil received has been carried in oceangoing tankers which have traversed international waters. All of the crude oil received by Pacific has been from foreign sources and none of the crude oil received by Sequoia or Gulf originated in California. All of the crude oil received has been transferred from vessels to the refinery by means of the facilities on the wharf and pipelines.

4. Cargoes of petroleum products are regularly shipped from and are occasionally received at the refinery by Pacific. These products are transferred to or from oceangoing tankers or barges by means of the wharf and pipeline facility. During each voyage to or from the refinery the oceangoing tankers and barges have carried said petroleum products across the navigable waters of the United States and the oceangoing tankers have carried said products across international waters.

5. Pursuant to the terms of Lease PRC 3414.1 as amended effective August 18, 1976, Pacific has paid to the State Lands Commission the following amounts for the calendar quarter beginning on August 18, 1976, and ending on November 17, 1976:

Minimum rental	$8,125
Additional thruput charges	$4,985.68

I estimate, based upon current level of operations at the refinery, that the additional thruput charges during the lease year beginning on November 18, 1976, and ending on November 17, 1977, will be $20,000.00.

/s/Kenneth T. Palmer

Subscribed and sworn to before me this 3rd day of December, 1976.

/s/Maurita R. King
Notary Public

[Seal]

[Remaining exhibits omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF EDWARD J. TAAFFE IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Edward J. Taaffe, declare:

1. I was an executive employee of the Land Department, Western Region of Chevron U.S.A. Inc. ("Chevron"), or its predecessor, continuously for the period January 2, 1940, until my retirement at the end of business on November 30, 1978. Among other duties, I had the responsibility for the supervision and administration of rights of way and leases for Chevron's various operating facilities, including State Lands Commission ("SLC") Lease No. P.R.C. 236.1.

2. Chevron presently owns and operates the Richmond Long Wharf which is located on tide and submerged land in Contra Costa County, owned by the State of California and leased from the SLC by Lease No. P.R.C. 236.1. True copies of the lease and subsequent renewals and amendments thereto are attached as exhibits in the following order:

Exhibit 1—Lease commencing August 19, 1947.

Exhibit 2—Amendment and renewal of lease dated June 15, 1973.

Exhibit 3—Extension and amendment of Lease No. P.R.C. 236.1 dated January 26, 1978.

3. The land leased from the State of California is totally undeveloped tide and submerged land. California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Chevron. In order to make the state's land usable, Chevron invested over $16,184,500.00 to construct the Richmond Long Wharf. In order to continue to use the wharf, Chevron is required

at its own expense to maintain it and dredge the submerged lands. For example, in 1976, Chevron spent over $850,000.00 for dredging alone.

4. Chevron made these substantial investments on the state's land and continues to properly maintain these facilities at great expense to enable Chevron to transport crude oil and refined product to and from its Richmond refinery. This refinery is adjacent to the state's land on approximately 3,160 acres owned by Chevron in fee. Chevron has invested in excess of $723,000,000.00 in this refinery. To operate the refinery, it is indispensable that Chevron be able to cross the state's land: there is no other means available to Chevron to transfer crude oil and other commodities between the refinery and vessels at sea.

5. From 1947 until the passage of the volumetric rental regulations, Chevron paid a rental to the SLC based on a reasonable rate of return on the appraised value of the leased land. For example, I was a participant in the negotiations resulting in the rental established for the lease period of August 19, 1967, through August 18, 1977. This rental was based entirely upon 6% of the appraised value of the land. Chevron's lease, Lease No. P.R.C. 236.1, provided that all renewals would be on "reasonable" terms, which Chevron believes to be a fair market rate of return on the appraised value of the leased land.

6. The renewal of Lease No. P.R.C. 236.1 expired August 19, 1977. Prior to that time, an application for a 10-year extension of lease was made by Chevron. During the negotiations for the lease extension, the SLC announced its intention to insist on the imposition of a volumetric rental. Chevron renewed its lease on this basis solely because of the tremendous investments that had been made on the land leased from the state and on the adjacent land owned by Chevron.

7. The renewed lease calculates the rent to be paid as follows. First, the SLC appraised the value of the land to be leased and applied an 8% return on the appraised value of the land. This amount, formerly the maximum rent and now the minimum rent, is $100,000.00 per year for 10 years.

8. In addition, the SLC requires a per barrel charge based on the total volume of commodities on and off loaded across the leased land. This per barrel rent will result in an additional charge over and above the minimum rent of $100,000.00 per year during the term of the lease of the following amounts:

Year	Amount
1977	$178,000 (actual)
1978	115,000 (actual)
1979	133,000 (actual)
1980	127,000 (approximate)
1981	133,000 (approximate)
1982	186,000 (approximate)
1983	198,000 (approximate)
1984	201,000 (approximate)
1985	201,000 (approximate)
1986	201,000 (approximate)

Based on the state's appraised value of the leased land, the SLC will receive an average annual net rate of return in each of said years in the amount of 21.5%, ranging from a low in 1978 of 17.2754% to highs for 1984, 1985 and 1986 of 24.1855%.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined product that passes over the state's land into or out of Chevron's Richmond refinery is subject to this charge. Of the commodities so transported through the Richmond Long Wharf, approximately 95% of the crude oil moves in interstate or foreign commerce, and approximately 90% of the refined product moves in interstate or foreign commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty of perjury that the foregoing facts are true and correct.

Dated at San Francisco, California, this 6th day of November, 1980.

/s/ Edward J. Taaffe

[Exhibits 1 and 2 omitted in printing]

Exhibit 3

State of California
State Lands Commission

Extension and Amendment of Lease P.R.C. 236.1

Whereas the State of California, acting through the State Lands Commission (herein called "Lessor"), and Chevron USA, Inc., a California corporation, as successor in interest to Standard Oil Company of California (herein called "Lessee"), are parties to an Agreement designated as Lease P.R.C. 236.1 and dated August 19, 1947, as amended by Amendment and Renewal of Lease P.R.C. 236.1 dated June 15, 1973, whereby Lessor granted to Lessee a lease covering certain described tide and submerged lands situate in Contra Costa County; and

Whereas by terms of the Lease, Lessee is entitled to extend the term thereof for three additional periods of ten years each upon such reasonable rental as Lessor might impose; and

Whereas Lessee has elected to extend the term of the Lease for an additional ten-year period to August 18, 1987; and

Whereas paragraph 16 of the Lease provides that the provisions hereof may be changed, altered or amended by mutual consent of the parties and the parties hereto desire to amend certain of such provisions and to incorporate certain other provisions not now contained therein:

Now, therefore, it is agreed by and between the parties hereto, as follows:

1. Extension of the Term. Pursuant to Lessee's election, the term of the Lease has been extended for a period of ten years beginning August 19, 1977 and ending August 18, 1987.

2. Amendment of Description of Demised Premises. The land description presently contained on page 2 of said Amendment and Renewal of Lease PRC 236.1 is hereby deleted in its entirety and there is substituted therefore that description shown on a map labeled Exhibit "A" attached hereto and by reference made a part hereof.

3. Annual Rental. Paragraphs 2 and 3 on page two of Lease PRC 236.1 dated August 19, 1947, and paragraph (2) of page 2 of Amendment and Renewal of Lease 236.1 dated June 15, 1973 are hereby deleted and the following substituted therefor:

"2. Monetary consideration: Commencing on August 19, 1977, and continuing through August 18, 1982, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U.S. gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be paid quarterly on or before December 10, March 10, June 10 and September 10 for the immediately preceding quarter of such lease year, as follows:

(a) Until the minimum annual rental provided for in subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 100,000,000 barrels beyond the number of barrels necessary to

satisfy the minimum rental under subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) The minimum annual rental for each lease year shall be $100,000 and shall be due and payable on or before the first day of such lease year; provided, however, that the minimum annual rental for the lease year commencing August 19, 1977 shall be due and payable (without interest) upon execution and delivery of this Extension and Amendment of Lease PRC 236.1 and Lessee shall be allowed as a credit thereto the sum of $34,218.25 heretofore paid on account thereof.

(d) Rental shall not be imposed for passage of a commodity over the State's land if rental has already accrued on that identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are not identical to crude oil include, but are not limited to: fuel oils, diesel oils, gasoline, petrochemicals, kerosenes, jetfuels, naptha and other middle distillates.

(e) Rental based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall not accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands.

(f) Lessee shall, with each quarterly rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the demised premises. Lessee shall maintain for audit of

such statements and shall furnish on thirty days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets, and other pertinent documents, sufficient to determine the nature, quantity, origin/destination and ownership of commodities so received or shipped. Such source documents shall be maintained for a period of at least five years after their preparation.

(g) The annual rental provided for herein shall be paid to Lessor without deduction, delay or offset, at such place as may be designated by Lessor, and at the times specified herein. In the event of the termination of the Lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

4. *Annual Rental for Second Five Years of Extended Term.* For the period beginning August 19, 1982 and ending August 18, 1987 (herein called the "Second Five-Year Period"), annual rental shall be paid as follows:

(a) Until the minimum annual rental provided for in paragraph 3(c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 50,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof: and thereafter $0.002 (2 mils) per barrel for next 50,000,000 barrels of such commodities passing

over the State's land in that same lease year; and thereafter $0.003 (3 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

5. *Holding Over and Late Payments.*

(a) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of this lease extension agreed herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive rentals, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be construed as a limitation upon any other remedy which the State may have against a hold over Lessee.

(b) It is agreed by the parties hereto that any rentals accruing under the provisions of this extension and amendment that shall not be paid when due shall bear interest from the date when the same was payable by the terms hereof at the rate specified in Public Resources Code Section 6224, until the same shall be paid by the Lessee.

(c) The failure to pay rentals when due shall also subject the Lessee to a penalty of ten (10) percent of each delinquent rental payment.

6. Lessor reserves the right to periodically inspect the leased land and improvements located thereon to insure that Lessee's improvements comply with applicable State and Federal regulations.

7. Paragraphs 8 and 12 of said lease PRC 236.1 are hereby deleted and the following substituted therefor:

"8. INDEMNITY, BOND AND INSURANCE:

(a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California,

its officers, agents and employees against any and all claims, demands, loss, action or liability of any kind which State of California, or any of its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them arising out of or connected with the issuance of this amended lease, including, without in any way limiting the generality of the foregoing, any claim, demand, loss, or liability arising from any failure of title or any alleged violations of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease or any extension thereof, and an additional period of one hundred twenty (120) days or until the State has accepted a quitclaim deed and sufficient evidence of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of Five Hundred Thousand Dollars ($500,000), to guarantee to Lessor the faithful performance and observance-by the Lessee of all of the covenants and conditions implied or specified in this amended lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his expense and keep in full force and effect during the term of this lease, for the protection of Lessee and the State in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and the surrounding area with limits of not less than $1,000,000 for bodily injury and $10,000,000 for property damage. The policy or policies shall specifically name the State as an insured party as to the land

under the lease; and the policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that liability insurance coverage herein provided for shall be in effect all times during the term of this lease, and until said leased land is restored as nearly as possible to the conditions existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased land as then improved, Lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the condition existing prior to the erection and placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the term of this amended lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than (1) year, or for not less than the remainder of this amended lease, and until the leased land is restored or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the State Lands Division, and Lessee agrees that no construction, improvements, additions, work or services shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insur-

ance coverage as herein provided, State may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

9. *Oil Spill Emergency.* In the event of a spill or leak of oil or other liquid pollutants into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services via the toll-free 24-hour service telephone number 1-800-852-7550. For spills of 10 barrels or more, Lessee shall report directly to the State Lands Division 24-hour service telephone number (213) 590-5201. Information to be reported shall include, but not be limited to:

The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the water body affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and the action taken.

10. *Marine Terminal/Wharf Operations.* Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State regulations and guidelines covering Lessee's operations on and about the demised premises. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

11. *Repossession.* In the event of failure of Lessee to pay rental, or in the event of a breach of any of the other covenants contained within the lease, as herein amended, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom and to repossess and

enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period and to diligently pursue to conclusion the actions necessary to cure such default, and, so long as such default is cured within such prescribed time limits, Lessor shall not repossess the demised premises as provided herein.

12. *Possessory Interest.* Lessee recognizes and understands in accepting this lease extension and amendment that his interest created therein may be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and paid by the Lessee.

13. *Reservation of Rights.* Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in paragraphs 3 and 4 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being Western Oil and Gas Association, et al. V. Cory, et al., U.S.D.C. (E.D. CAL.), No. CIV S-76-513 and Western Oil and Gas Association, et al. V. California State Lands Commission, Sacramento Superior Court No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of minimum annual rental of $100,000 set forth in Paragraph 3 (c) hereof in an interest-

bearing Special Deposit Account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the Special Deposit Account. Notwithstanding the foregoing in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Subparagraph 3 (c) hereof, it being expressly acknowledged by Lessee that annual rental in that fixed amount is reasonable and within Lessor's statutory authority. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered, under Paragraph 17 of the Lease, to impose a reasonable rental for the 10-year period commencing August 19, 1977.

All other terms and conditions of Lease PRC 236.1 shall remain in full force and effect.

The effective date of this Amendment shall be and is August 19, 1977. This Agreement will become binding on the Lessor only when duly executed on the behalf of the State Lands Commission of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated March 7, 1978]

[Subscriptions, acknowledgment, and property description omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF MILFORD S. WALLER IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Milford S. Waller, declare:

1. I am employed by Shell Oil Company in the capacity of Staff Engineer and have been so employed since 1967. Among other duties, I have the responsibility for the supervision and administration of rights of way and leases for various operating facilities, including State Lands Commission ("SLC") Lease No. P.R.C. 4908.1.

2. Shell Oil Company presently owns and operates the Martinez Wharf (the "Wharf") which is located on tide and submerged land in Contra Costa County, owned by the State of California and leased from the SLC by Lease No. P.R.C. 4908.1. True copies of the lease and subsequent renewals and amendments thereto are attached as exhibits in the following order:

a. Renewal and Amendment of Lease P.R.C. 543.1 dated May 16, 1974, effective August 1, 1974.

b. Amendment of Lease P.R.C. 4908.1 dated 11/5/79, effective August 1, 1979, and covering throughput charges.

c. Amendment of Lease P.R.C. 4908.1 dated 4/29/80, effective April 1, 1980, and covering modernization of Wharf.

d. *Proposed* amendment to P.R.C. 4908.1 signed by Shell on June 19, 1980 and covering operation of the Wharf.

3. The land as leased from the State of California is totally undeveloped tide and submerged land. California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Shell Oil Company. In order to make the state's land usable, Shell Oil Company invested over $3 million to construct the Wharf, causeway, necessary dolphins, piling, and Wharf pipelines for the transportation of petroleum products. Replacement value for this facility is $10 million. In order to continue to use the Wharf, Shell Oil Company is required at its own expense to maintain it and dredge the submerged lands. For example, in 1964, Shell Oil Company spent over $73,000 for dredging alone.

4. Shell Oil Company made these substantial investments on the state's land and continues to properly maintain these facilities at great expense to enable us to transport crude oil and refined product to and from our Martinez manufacturing complex. This chemical and refining complex is adjacent to the state's land on approximately 1100 acres owned by Shell Oil Company in fee. Shell Oil Company has invested in excess of $251 million in this complex. To operate the complex, it is indispensable that we be able to cross the state's land: there is no other means available to transfer crude oil and other commodities between the complex and vessels at sea.

5. From 1948 until the passage of the volumetric rental regulations, Shell Oil Company paid a rental to the SLC based on a reasonable rate of return on the appraised value of the leased land. Shell Oil Company's lease, Lease No. P.R.C. 4908.1, provided that all renewals would be "reasonable" terms, which we believe to be a fair market rate of return on the appraised value of the leased land.

6. The renewal of Lease No. P.R.C. 4908.1 expired on August 1, 1979. Prior to that time, an application for a 10-year extension of lease was made by Shell Oil Company.

During the negotiations for the lease extension, the SLC announced its intention to insist on the imposition of a volumetric rental. Shell Oil Company renewed its lease on this basis solely because of the tremendous investments that had been made on the land leased from the state and on the adjacent land owned by Shell Oil Company.

7. The renewed lease calculates the rent to be paid as follows: First, the SLC appraised the value of the land to be leased and applied an 8 percent return on the appraised value of the land. This amount is $60,000 per year.

8. In addition, the SLC requires a per barrel charge based on the total volume of commodities on and off loaded across the leased land. This per barrel rent will result in an additional charge over and above the minimum rent of $60,000 per year during the lease year, August 1, 1979 to July 31, 1980 of $62,374. Based on the state's appraised value ($753,357 @ $.90/sq. ft.) of the leased land, the SLC will receive an average annual net rate of return in the amount of 17.57 percent.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined produce that passes over the state's land into or out of the complex is subject to this charge. Of the commodities so transported over the Wharf, 100 percent of the crude oil moves in interstate or foreign commerce, and 41 percent of the refined product moves in interstate or foreign commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty of perjury that the foregoing facts are true and correct.

Dated at Martinez, California, this 6th day of November, 1980.

/s/ Milford S. Waller

[Exhibits a-c omitted in printing]

Exhibit d

June 19, 1980

State Lands Commission
ATTN Mr Gary Horn
1807 - 13th Street
Sacramento, CA 95814

Gentlemen:

RE: FILE REF. PRC 4908.1—AMENDMENT TO WHARF LEASE

Attached are two executed copies of revised Lease Amendment based on your transmittals of February 25, 1980 and March 17, 1980. As discussed with Mr. M. S. Waller, we have revised items (a) 1 and 2 to reflect our current wharf manning and personnel titles. Both the Dispatching Operations Foremen and the Wharfman-in-Charge are designated to the United States Coast Guard as persons-in-charge of the wharf under Coast Guard regulation 154.710, with the Wharfman-in-Charge stationed at the vessel and carrying out the primary responsibility for the transfer.

We object to the effective date of the amendment being March 1, 1980, and have changed this to July 1, 1980, since the date of submission of the operations manual is one year from the effective date.

Very truly yours,

R. F. Andrews
Technical Superintendent
Martinez Manufacturing
Complex

MSW:cl
Attachments
cc: R. A. Wilson (without attachment)
R. M. Kingsbury (without attachment)
L. D. Ross (with attachment)
J. A. Sprecher (with attachment)
D. L. Morrison (with attachment)
J. C. Miller (with attachment)
R. F. Andrews (with attachment)
M. S. Waller (with attachment)

R. J. Bertus—Operations Fuel—Logistics Manager—West Coast and Southwest—Head Office (with attachment) "d"

State of California
State Lands Commission

Amendment of Lease PRC 4908.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor and Shell Oil Company, as Lessee, made and entered into a Lease Agreement, designated Lease PRC 4908.1 covering certain tide and submerged land situated in Contra Costa County; and

Whereas, the State Lands Commission has expressed concern that petroleum terminal operations on lands under its jurisdiction should be conducted in as safe a manner as possible; and

Whereas, the Commission staff, in concert with petroleum and utility industry representatives has developed lease conditions that would be included as part of all existing and any future marine transfer facilities; and

Whereas, the Commission has, by resolution, adopted such standard provisions, covenants and restrictions for operation of marine petroleum transfer facilities on State lands; and

Whereas, Lease PRC 4908.1 provides that said Agreement may be terminated, the provisions altered, changed or amended by mutual consent of the parties; and

Whereas, by reason of the foregoing, it is now the desire of the parties to amend the aforesaid Agreement.

Now therefore, it is agreed by and between the parties hereto as follows:

Not withstanding any other provision of this lease the following provisions shall apply to this lease:

(a) Lessee shall have specifically designated personnel (Persons-In-Charge) who shall be responsible for assuring that the terminal-related portion of any loading, unloading or bunkering operations is carried out

in a manner which is safe and will not pollute the surrounding waters.

1. There shall be a designated person-in-charge (the Dispatching Operations Foreman-West or his alternate, the Operations Foreman-East) of the terminal premises at all times during transfer activities over the Wharf and at any time a vessel being loaded, unloaded, or bunkered is at the Wharf. Such person shall be specifically trained to carry out his or her responsibilities with respect to this transfer and shall have the authority to take all actions, including starting and stopping transfer operations, conducting business with representatives of any governmental authority and initiating spill clean up and containment operations, necessary to assure that loading, unloading and bunkering operations are conducted in a manner which is safe and will not pollute the surrounding waters.

2. In addition to the Operations Foreman, there shall be at least one Wharfman-in-Charge stationed at the Wharf at all times transfer operations are occurring who has been specifically trained to carry out loading, unloading, and bunkering operations in a manner which is safe and will not pollute the surrounding waters.

(b) Lessee shall take reasonable steps, including but not limited to, periodic unannounced inspections of the terminal facility and its transfer operations to ensure that terminal personnel at such facility, and specifically those engaged in such operation, are observing: (1) applicable Federal, State and local laws and regulations; and (2) prudent working practices, i.e. terminal personnel are alert, have not been on duty for an unreasonable period of time and are not under the influence of alcohol or drugs. Subsequent to such inspections, Lessee shall file a report summarizing its

findings and enumerating deficiencies, if any, and recommended or established procedures to correct such deficiencies. These operational reports shall be maintained at the facility for a period of one year and will be accessible for review by the staff of the Commission and other public safety agencies such as the U. S. Coast Guard. In addition to such inspections of routine operations, the personnel and equipment, if any, at the terminal shall be subjected to periodic fire safety and oil spill training and drills. Such training and drills will be conducted on a periodic basis, which shall be designated in Lessee's terminal operations manual.

(c) Lessee's terminal facility shall have an oil spill containment and clean up plan. Oil spill containment booms and other oil spill equipment shall be available to the terminal by means of either (1) owned or leased equipment with trained manpower at the terminal site, or (2) contractor equipment and manpower readily available in the harbor area, or (3) oil spill cooperative arrangements for equipment and manpower and other terminal operators in the harbor area, or (4) a combination of the above.

Such oil spill containment and clean up plan shall be a part of the operations manual and shall be submitted to the State Lands Commission staff for review and comment. In making modifications, if any, to the plan and/or the oil spill clean up equipment available pursuant to such plan, effective consideration shall be given to the State Lands Commission's comments. Prior to the submission of such comments, the Commission staff shall consult with the U. S. Coast Guard.

(d) Lessee's terminal facility shall have an operations manual which has been reviewed and accepted by the U. S. Coast Guard as soon as practicable, but in no case more than one year from the effective date of these lease provisions. The manual or any amendment

thereto shall also be submitted to the State Lands Commission for review and comment at the earliest practicable time, but not later than its submission to the Coast Guard as provided herein and under federal rules and regulations.

(e) Lessee shall ensure that an effective communication system is available and in operation between the vessel and shore terminal personnel at all times when transfer operations are occurring. If, for any reason, the communication system becomes inoperable, transfer operations shall be suspended using the procedures in the terminal operations manual.

(f) 1. Subsequent to the completion of berthing and prior to the commencement of loading or unloading operations, Lessee shall satisfy itself that the vessel is operating with a Federal Maritime Commission Certificate of Financial Responsibility and under a valid Coast Guard certificate of inspection in the case of a United States flag vessel or documentation indicating the results of the latest Coast Guard inspection of the vessel in the case of a foreign flag vessel. Lessee shall also assure, from the vessel master, that all equipment and procedural deficiencies noted by the Coast Guard have been or are being corrected in the manner prescribed by the Coast Guard, and that a declaration of inspection has been executed prior to bulk cargo transfer verifying that a vessel inspection has been conducted by vessel personnel. The declaration of inspection shall include all inspection items set forth in the operations manual. The terminal operator shall also verify that terminal inspection has been conducted by terminal personnel prior to commencement of the transfer operations.

2. A copy of each declaration of inspection prior to bulk cargo transfer shall be maintained by Lessee

for a period of at least one year from the date such declaration is executed. The declaration shall promptly be made available to State Lands Commission representatives upon demand.

3. Lessee shall ensure that the declaration of inspection contains, at a minimum, those items listed on Exhibit "A" attached hereto and by reference made a part hereof.

All other terms and conditions of Lease PRC 4908.1 shall remain in full force and effect.

The effective date of this Agreement shall be and is July 1, 1980 and this Agreement will become binding on the Lessor only when duly executed on behalf of the State Lands Commission of the State of California.

In Witness Hereof, the parties hereto have executed this Agreement as of the date hereafter affixed.

Lessee—Shell Oil Company	State of California State Lands Commission
By: /s/ O. L. Wood	By:
Title Manager Martinez Manufacturing Complex	Title
Date June 19, 1980	Date
(Seal)	This issuance of this amendment was adopted by the State lands Commission on _____

Exhibit A

Items for Inclusion On Facility and/or Vessel Check-off Lists

No.	Item Description	Facility	Vessel
1.	The Persons-in-Charge shall speak fluent English. If not possible, a person who speaks fluent English shall be stationed near the shutdown button or valve and shall maintain continuous communication with the terminal and vessel Persons-in-Charge.	X	X
2.	The vessel shall have a red flag or light. Warning signs on the wharf, gangway, radio room, and off-shore side of the vessel shall be in place.		X
3.	Vessel mooring lines shall be strong enough to hold in and be of sufficient length to adjust to expected conditions.		X
4.	The vessel cargo transfer system shall be aligned and ready to transfer. Unnecessary or unused manifold connections shall be blanked off using adequate gaskets and at least 4 bolts, or an approved blanking device. The transfer system shall be connected to a fixed piping system.		X
5.	All overboard discharge and sea suction valves connected to oil transfer system, dirty ballast, or cargo tanks shall be closed and sealed, or lashed.		X
6.	The loading hose must have no loose covers, kinks, bulges, soft spots and no gouges, cuts or slashes that penetrate the hose reinforcement. Loading hoses or arms must be long enough to allow ship movement and must be supported so as to prevent strain on the hose or arm coupling.	X	X
7.	Suitable material must be used in joints and couplings to make a tight seal. Hose connections must be made with the proper size bolts		

No.	Item Description	Facility	Vessel
	in at least every other hole with ANSI standard flanges or with a USCG approved quick disconnect coupling. Permanent hose connections and other ANSI connections shall have a bolt in every hole.	X	X
8.	The vessel must have a containment system under or around each manifold, connection, vessel fuel tank vent, and overflow and fill pipe which complies with Coast Guard regulations. Each scupper or drain in the discharge containment system must be closed.		X
9.	The Person-in-Charge shall remain in the vicinity of the transfer operation and be available to the oil transfer personnel to supervise connections, disconnections, topping off and emergency shutdowns, if needed.	X	X
10.	No fire or open flame will be permitted during transfer operations. All repair work on the vessel or wharf which can serve as an ignition source must have prior Coast Guard approval and, where required, approval by local fire and harbor officials. Power or manual spark producing devices shall not be operated on weather decks, in pumprooms, in cargo or fuel tanks, or in compartments which may accumulate vapors. Boiler and galley fires must not constitute a fire hazard.	X	X
11.	The vessel and shore facility will have adequate lighting to safely conduct the transfer operation.	X	X
12.	Smoking shall be permitted only in approved areas. "No smoking" signs shall be conspicuously posted in all other areas.	X	X
13.	A pre-transfer conference must be held by the Persons-in-Charge covering: products; discharge sequence and rates; names of persons involved; transfer system details and critical		

No.	Item Description	Facility	Vessel
	stages; applicable rules; emergency, discharge containment and reporting, and shutdown procedures; and shift change procedures.	X	X
14.	Sufficient crewman to get the vessel underway in an emergency shall remain aboard the vessel, if self-propelled, at all times. Emergency towing wires shall be rigged outboard fore and aft and maintained within 2 meters of the water surface while the vessel is moored alongside a wharf. The engines and vessel shall be kept ready to depart within 30 minutes in an emergency and whenever possible the vessel shall be moored so as to facilitate departure. If the engines are down, one or more tugs, depending on vessel size, shall be on standby call.		X
15.	The terminal and vessel Person-in-Charge shall indicate and acknowledge to each other that they are ready to transfer prior to starting the operation.	X	X
16.	Intoxicated and disorderly persons shall not be permitted on the terminal premises or aboard the vessel, except crewmen who are escorted from the gate to the vessel by the ships' personnel when transfer operations are not occurring. It shall be the responsibility of the vessel Person-in-Charge to ascertain whether vessel personnel are intoxicated and disorderly and it shall be the responsibility of the terminal Person-in-Charge to ascertain whether terminal personnel are intoxicated and disorderly.	X	X
17.	All vessel cargo and personnel compartment openings will be closed during transfer, except when required to be temporarily opened. Pressure relief valves and cargo vents shall be fitted with Coast Guard approved flame screens. When open, ullage holes shall be fitted with		

No.	Item Description	Facility	Vessel
	Coast Guard approved flame screens. Flame screens shall be of the proper size and in good condition. Vent piping shall be sound and free of leaks.		X
18.	Sufficient servicable fire equipment with suitable nozzles shall be attached to the fire main and shall be ready for instant use. There shall be adequate water pressure to supply at least 50 lbs. of pressure at each nozzle. There shall be at least five portable class BC fire extinguishers with capacities of not less than 20 lbs. each on deck. Two shall be located at each side of the manifold and one at the gangway or accommodation ladder. All fire extinguishers shall be approved by the appropriate authority of the vessel's flag country.	X	X
19.	All transfer system connections and pressure gauges shall be monitored to check for leaks and to ensure that the maximum working pressure is not exceeded.	X	X
20.	Provisions shall be made to ensure that all spills are reported immediately to the Persons-in-Charge.	X	X
21.	Electrical equipment shall be approved for the hazardous area it is used in. All electrical installations in the pumproom shall be either explosion-proof and/or intrinsically safe except when handling only grade E cargo. All wiring in hazardous areas shall be in good condition. Electrical cables to portable equipment shall be disconnected unless certified for use in hazardous areas.	X	X
22.	If electrical bonding is used, it shall be activated by an approved switch prior to the cargo hose disconnection and spillage removal. The bonding system shall have a means of indicating continuity of the bond.		X

No.	Item Description	Facility	Vessel
23.	The facility Person-in-Charge shall have the cargo information card for each cargo being handled immediately available.	X	
24.	All communication equipment used in the transfer operation shall be tested and properly working. Tests shall be made immediately prior to transfer and hourly thereafter.	X	X
25.	Cargo decks of the vessel shall remain free of dirty rags, rubbish, debris and loose tools. Excess hydrocarbon leakage in pumproom bilges shall not be permitted.		X
26.	All cargo transfer, except transfer of high pour-point crude products, and tank cleaning operations shall be immediately shutdown if any of the following occurs:	X	X
	a. A severe electrical storm.		
	b. A fire on the vessel, at the wharf or in the vicinity of either.		
	c. Sufficient competent personnel are not present during cargo handling or a language barrier develops between the vessel and the facility.		
	d. If a break occurs in the transfer system, cargo is leaking at the joints or connections at a rate exceeding the capacity of the containment system, or if a spill occurs.		
	e. If a serious vapor condition develops aboard or around the vessel or facility.		
	f. If an emergency arises which may result in a spill or affect the safety of the transfer of high pour-point crude or products may continue in spite of the occurrence of (a) through (f) until preparation can be made to prevent damages to the transfer piping and equipment if doing so would not present an immediate risk of fire; explosion or cargo spillage.		

No.	Item Description	Facility	Vessel
27.	Cargo transferring shall begin slowly. Couplings and hoses shall be inspected for leaks prior to transferring at operating pressure, and during the transfer operation.	X	X
28.	The vessel Person-in-Charge must notify the facility Person-in-Charge that he is ready for final topping-off. This will proceed at an agreed upon loading rate.	X	X
29.	Access to the facility shall be unobstructed. Non-spark proofed motor vehicles shall not be operated in the immediate vicinity of a tank vessel during transfer operations.	X	
30.	If the vessel design permits, all air intakes which may take in vapors or are in the immediate vicinity of a cargo tank opening or venting point shall be closed. Compartment air intake vents shall be trimmed away from the the cargo area to prevent intake of vapor. Window-type air conditioning units facing cargo areas shall be disconnected.		X
31.	The main transmitting antennae shall be switched off and grounded.		X
32.	The facility Person-in-Charge shall satisfy himself that the vessel is operating under a valid Coast Guard certificate of inspection in the case of a United States flag vessel or documentation indicating the results of the latest Coast Guard inspection of the vessel in the case of a foreign flag vessel.	X	
33.	The vessel Person-in-Charge shall provide assurance that all equipment and procedural deficiencies noted by the Coast Guard have been or are being corrected in the manner prescribed.		X

[Certificate omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

SUPPLEMENTAL DECLARATION OF B. R. SWANSON IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, B. R. Swanson, declare:

1. I am the same B. R. Swanson who filed an affidavit in this proceeding, dated November 22, 1976, a copy of which is annexed as Exhibit I hereto. I am presently employed by Tosco Corporation ("TOSCO"). as Transportation Manager. In this position, I have responsibility for the supervision and administration of certain rights of way and leases for Tosco's various operating facilities, including State Lands Commission ("SLC") Leases Nos. P.R.C. 3453.1 and 3454.1.

2. Tosco presently owns and operates a wharf facility on property known as the Amoreo Terminal. This terminal is located in substantial part on tide and submerged lands in Contra Costa County owned by the State of California and leased from the SLC. Lease No. P.R.C. 3453.1 covering the Amoreo Terminal and related assignments and amendments are attached hereto as Exhibit 2. Tosco additionally owns and operates a wharf facility on property known as the Avon Terminal. This terminal is located in substantial part on tide and submerged lands in Contra Costa County owned by the State of California and leased from the SLC. Lease No. P.R.C. 3454.1 covering the Avon Terminal and related assignments and amendments are attached hereto as Exhibit 3.

3. The land leased from the State of California was totally undeveloped tide and submerged land. In order to make the leased land usable, Tosco and its predecessors have invested over $1,970,000.00 in constructing the Amoreo

Terminal and over $580,000 in constructing the Avon Terminal. The State of California has never provided any services in connection with the maintenance or operation of these terminals. In order to continue the use of these improvements, Tosco must maintain these facilities at its own expense. As an example, these submerged lands must be dredged periodically, and in 1977 Tosco spent $98,000 for dredging near the Amoreo Terminal. Dredging costs at the Avon Terminal are estimated to cost $100,000 in 1981. Tosco and its predecessors made these substantial investments on the lands leased from the State of California because the State of California controls all the available lands in the area suitable for the conduct of Tosco's wharf operations.

4. The Amoreo and Avon Terminals were designed to serve Tosco's Avon Refinery. The refinery is adjacent to the State's land on approximately 2,114 acres of Tosco's fee owned land. Tosco and its predecessors has invested in excess of $100,000,000.00 in constructing the refinery. To operate the refinery, crude oil and refined product must be transferred between the refinery and ocean vessels. The leased land is therefore indispensible: Tosco must cross state tide and submerged lands.

5. Before the 1976 passage of the volumetric rental regulations, Tosco paid to the SLC a rental based on a reasonable rate of return on the appraised value of the leased land. Tosco's leases provided that all renewals would be on "reasonable" terms, which Tosco believes to be the fair market rate of return on the appraised value of the land.

6. Nevertheless, by letters dated October 18, 1976, and April 12, 1979, the SLC announced its intentions to impose a volumetric rental on each of Tosco's leases. Tosco renewed its leases on this basis because Tosco must cross State tide and submerged land to have access to ocean going vessels, and because of the tremendous investments

that had been made on the land leased from the State and on Tosco's adjacent land.

7. The renewed leases calculate the rent to be paid as follows. First, the State has appraised the value of the land to be leased and applied an eight percent (8%) return on that appraised value. This amount, formerly the maximum rent, is now the minimum rent. For the Amorco Terminal (Lease No. P.R.C. 3453.1), the minimum rent is $42,000.00 each year. For the Avon Terminal, (Lease No. P.R.C. 3454.1), the minimum rent is $30,000.00 each year.

8. In addition, the SLC now imposes a throughput charge based on the volume of commodities passing over the leased lands at the Amorco and Avon Wharf facilities. This throughput charge is a sliding scale charge, which varies from one-tenth of one cent to one cent per barrel, which resulted in an annual charge of $31,830.00 over the minimum charge in 1979 for the Amorco Terminal (Lease No. P.R.C. 3453.1), and which is estimated to be approximately the same amount in 1980. For the Avon Terminal, (Lease No. P.R.C. 3454.1), the annual charge in 1980 is estimated to be approximately $10,000 over the minimum charge. Based on the State's appraisal of the leased land, it is calculated that the State will receive an annual net rate of return of approximately 14.0 percent for the Amorco Terminal (Lease No. P.R.C. 3453.1) and 10.6 percent for the Avon Terminal (Lease No. P.R.C. 3454.1).

9. The additional throughput charge described in the last paragraph is imposed for the privilege of crossing the State's land. Every parcel of a commodity that enters or leaves the wharf facilities at the Amorco and Avon terminals is subject to this charge. These commodities are frequently moving in interstate or foreign commerce. As for commodities crossing the Amorco wharf into or out of the Avon Refinery in 1980, approximately 10 percent is in

foreign commerce, 11 percent is in intrastate commerce and 79 percent is in interstate commerce. As for commodities crossing the Avon wharf into or out of the Avon Refinery in 1980, approximately 5 percent is in foreign commerce, 54 percent is in intrastate commerce and 41 percent is in interstate commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty that the foregoing facts are true and correct.

Dated at Los Angeles, California, this 21st day of November 1980.

/s/ B. R. Swanson

Exhibit 1

AFFIDAVIT OF B. R. SWANSON

COUNTY OF LOS ANGELES)
STATE OF CALIFORNIA)

B. R. Swanson, being duly sworn, deposes and says:

1. I, B. R. Swanson, am employed by Lion Oil Company ("Lion"), Los Angeles, California, as Operations Manager, with management authority and responsibility over Lion's West Coast trucking and terminal operations, including the Diablo Terminal and State Lands Commission ("SLC") Lease No. P.R.C. 2757.1 hereinafter mentioned, as well as all other properties and SLC leases and easements.

2. Lion presently owns and operates a marine terminal (with deep water dock and loading facilities), referred to as its Diablo Terminal which terminal is located in substantial part on tide and submerged lands owned by the State of California in Contra Costa County, which lands are covered by a lease with the State Lands Commission ("SLC"), designated as Lease No. P.R.C. 2757.1, as renewed by Renewal and Amendment of Lease P.R.C. 2757.1. Said lease was assigned to Lion, with the approval of the SLC, by Phillips Petroleum Company in March of 1976. A copy of said lease and assignment is attached hereto as Exhibit "A".

3. California does not own any of the facilities located on the land covered by Lease No. P.R.C. 2757.1 as renewed and amended. California provides no facilities or services in conjunction with said leased land or operations thereon.

4. Said terminal is used in the exporting and importing, by ship or barge, of petroleum coke and other products. All of the products transported over this facility are moving in interstate or foreign commerce, i.e. between states or with a foreign country.

5. In light of the bulk of the products being transported and the distance it is transported, much to Japan, it would

be impractical and prohibitively expensive to transport such products by any means other than a seagoing vessel. It is necessary, therefore, that there be a terminal located on submerged and tide lands, deep water channel, for this purpose. Lion's Diablo Terminal is so located for such purpose, i.e. handling of loading and unloading of seagoing vessels in the transportation of petroleum coke (produced by Lion and others) and other products. Such terminal would have no value to Lion without the use of the adjoining submerged and tidelands owned by the State of California and leased to Lion under Lease No. P.R.C. 2757.1, as renewed and amended.

6. At the time Lion took an assignment of Lease No. P.R.C. 2757.1, as renewed and amended, the rental provision fixed the annual rent at $9,266.40 per year. That figure is set forth in Renewal and Amendment of P.R.C. 2757.1, approved by the SLC in March of 1976. A copy of that renewal and amendment is attached hereto as part of Exhibit "A".

7. By letter dated July 29, 1976, purportedly pursuant to paragraph 2 of the aforementioned renewal and amendment, the SLC notified Lion of its intention to charge a volumetric rent under Lease No. P.R.C. 2757.1, as renewed and amended, in the amount of five cents per ton on any and all bulk commodities passing over Lion's terminal wharf. That letter further set a minimum annual rental at the same $9,266.40 annual rental figure previously fixed therein. A copy of that letter is attached as Exhibit "B".

8. In the past, approximately 400,000 tons of coke and other bulk commodities have passed over this terminal wharf annually and, assuming this experience to continue, the effect of the proposed five cents per ton throughput charge will be an increase in Lion's annual rental, over and above the $9,266.40 figure, and in an amount exceeding $19,000.00.

9. Attached hereto as Exhibit "C" is a true copy of letter notice dated October 18, 1976, SLC to Lion, respect-

ing proposed volumetric rental charges under proposed renewal of SLC Lease P.R.C. 3453.1 at Lion's Amorco Wharf, deep water, Contra Costa County, California.

10. I know the above from my own personal knowledge and could competently testify thereto.

/s/ B. R. Swanson
B. R. SWANSON

[Dated November 22, 1976]

[Acknowledgment and exhibits omitted in printing]

[Exhibit 2 omitted in printing]

Exhibit 3

State of California
State Lands Commission

Renewal and Amendment of Lease PRC 3454.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor, and Tidewater Oil Company, as Lessee, made and entered into a Lease Agreement, designated Lease PRC 3454.1, covering certain tide and submerged land situate in Contra Costa County, which lease was issued March 23, 1966 by the State for a period of fifteen years commencing July 26, 1964; and

Whereas, said lease was, effective July 15, 1966, assigned, with approval of Lessor, to Phillips Petroleum Company; and

Whereas, said lease was amended by instrument dated July 10, 1974; and

Whereas, said lease was, effective March 31, 1976, assigned by Phillips Petroleum Company to Lion Oil Company, a Delaware Corporation, with approval of Lessor; and

Whereas, said lease was, effective January 30, 1978, assigned by Lion Oil Company to Tosco Corporation by way of merger, with the State's assent; and

Whereas, by terms of said Lease PRC 3454.1, Paragraph 20, Lessee was granted the right of renewal thereof for three additional periods of ten years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose; and

Whereas, Paragraph 19 of said lease PRC 3454.1 provides that the agreement may be terminated or the provisions changed, altered or amended by mutual consent of the parties; and

Whereas, Tosco Corporation, successor Lessee, has now formally exercised its right of renewal of said lease PRC 3454.1, for the first additional period of ten (10) years, upon the terms and conditions as hereinafter provided:

Now, therefore, it is agreed by and between the parties hereto as follows:

1. Lease PRC 3454.1 is hereby renewed for a period of ten (10) years beginning January 1, 1980 and ending December 31, 1989.

2. Effective July 26, 1979, Paragraphs 2 and 3 of original lease PRC 3454.1 and subsequent recitals of annual rent are hereby deleted and the following substituted therefore:

"2. Monetary Consideration: (a) For the interim period prior to commencement of the new lease year on January 1, 1980 and beginning July 26, 1979 and ending December 31, 1979, minimum rental for occupation of the lease land shall be $12,500. Such minimum rental shall be applied against a volumetric rental payable by Lessee for such interim period according to the following schedule:

$0.01 per barrel of crude oil, products and derivatives thereof passing over the State's land until the minimum rental for the interim period is equaled; thereafter

$0.001 per barrel for the next 3,000,000 barrels, passing over the State's land during the interim period; and thereafter

$0.003 per barrel for each additional barrel passing over the State's land during the interim period.

Such rental for the interim period shall be due on December 31, 1979 and shall be paid on or before January 31, 1980. Lessee shall be entitled to a credit of $8,069.78 against the minimum rental for the interim period, such amount having been paid on account.

(b) Commencing on January 1, 1980, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U. S. Gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter of the lease year and shall be paid on or before the thirtieth day of the following month, as follows:

(1) Until the minimum annual rental provided for in Subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(2) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 7,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under Subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and

thereafter $0.006 (6 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease; year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same year.

(3) *Minimum Annual Rental*: The parties hereto agree that the minimum annual rental for the wharf site shall be $30,000 and shall be paid in advance by Lessee on or before January 1, 1980, and on each anniversary thereafter.

(4) For purposes of Subparagraphs (a) and (b) hereof, rental shall not be imposed for passage of a commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are not identical to crude oil include, but are not limited to fuel oil, diesel oils, gasoline, petrochemicals, and middle distillates.

(5) Annual rentals, based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall not accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands."

3. Lessee shall, with each rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor, signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the State's land. Lessee shall maintain for audit of such statements and shall furnish on thirty (30) days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets, and/or other pertinent documents, sufficient to deter-

mine the nature, quantity, origin/destination and ownership of commodities received or shipped. Such source documents shall be maintained for a period of at least five (5) years after their preparation.

4. (a) Lessee agrees to pay the annual rental stated in Paragraph 3 hereof to Lessor without deduction, delay or offset, at such place as may be designated by Lessor from time to time, in advance, on, or prior to the beginning date of this lease renewal and each anniversary of such beginning date during each year of the term hereof.

(b) Lessor may, effective on the fifth anniversary of the beginning date of this renewal period (January 1, 1980) and each subsequent fifth anniversary of the said beginning date, elect to change the amount of rental to be paid by Lessee hereunder. Such change in annual rental shall conform to the requirements of 2 Cal. Adm. Code, Article 2. Such change in annual rental shall not become effective unless Lessor gives Lessee written notice of such change on or before sixty (60) days before the effective date of such change. Should Lessor fail to effect a change of such annual rental effective on any such fifth anniversary of said beginning date, the annual rental shall remain the same as the rental payable for each year during the immediately preceding five-year period; provided, however that for any years remaining before the next five-year anniversary of said beginning date, Lessor, on written notice of not less than sixty (60) days before the next annual rent becomes due, may fix a different annual rental, which annual rental shall be determined in the manner hereinbefore set forth, which annual rental shall be payable each year thereafter by Lessee unless thereafter changed in the manner herein provided. Any change in the annual rental effective on a date other than any fifth anniversary of said beginning date, shall be without prejudice to Lessor's right

to change said annual rental on each succeeding fifth anniversary of beginning date as above provided. It is specifically agreed that in the event of the termination of this lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

(c) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of the lease renewal period agreed herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm new rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive amounts, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be construed as a limitation upon any other remedy which the State may have against a holdover Lessee.

(d) It is agreed by the parties hereto that any installments of rental accruing under the provisions of this lease that shall not be paid when due shall bear interest at the specified rate from the date when the same was payable by the terms hereof, as provided in Public Resources Code Section 6224 until the same shall be paid by the Lessee.

(e) The failure to pay the rentals specified in this lease shall subject the Lessee to a ten (10) percent penalty on the accrued and unpaid balances for the rental payable after January 1, 1976.

5. Paragraphs 9 and 13 of said Lease PRC 3454.1 are hereby deleted and the following substituted therefor:

"9. Indemnity, Bond and Insurance: (a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California, its officers, agents and employees against any and all claims,

demands, loss, action or liability of any kind which the State of California, or any of its officers, agents or employees may sustain or incur which may be imposed upon them or any of them arising out of or connected with the issuance of this lease including, without in any way limiting the generality of the foregoing, any claim, demand, loss or liability arising from any failure of title or any alleged violation of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease or any extension thereof, and an additional period of one hundred (120) days or until the State has accepted a quitclaim deed and sufficient evidences of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of $50,000.00, to guarantee the Lessor the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in this lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his own expense and keep in full force and effect during the term of this lease for the protection of Lessee and the State, in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and their surrounding area with limits of not less than $1,000,000 for bodily injury and $5,000,000 for property damage. The policy or policies shall specifically name the State as an insured party as to the land under lease; and the policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that the liability insurance coverage herein provided for shall be in effect at all times during the term of this lease, and until said leased land is restored as nearly as possible to condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased land as then improved, lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the conditions existing prior to the erection or placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the terms of this lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than one (1) year, or for not less than the remainder of this lease, and until the leased land is restored or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the Lessor and Lessee agrees that no construction, improvements, additions, work or service shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insurance coverage as herein provided, Lessor, may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

6. Paragraph 6 of said Lease PRC 3454.1 is hereby deleted and the following substituted therefor:

"6. Assignment, Transfer or Subletting: (a) Lessee shall not either voluntarily, or by operation of law, assign, transfer, mortgage, pledge, hypothecate or encumber this lease or any interest therein, and shall not sublet the said premises or any part thereof, or any right or privilege appurtenant thereto, or allow any other person (the employees, agents, servants and invitees of Lessees expected) to occupy or use the said premises, or any portion thereof, without the prior written approval and consent of the Commission. A consent to one assignment subletting, occupation or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by another person. Consent to any such assignment or subletting shall in no way relieve lessee of any liability under this lease and shall be subject to any and all conditions required by the Commission, including, without limitation by reason of specification herein, the altering, changing or amending of this lease as deemed by the Commission to be in the best interests of the State. Any such assignment or subletting without such consent shall be void, and shall, at the option of the Commission constitute a default under the terms of this lease.

(b) The leasehold interest hereby described is created as an appurtenance to littoral land. The leasehold interest is not severable from the rights and interests of the Lessee in the littoral land without the express written approval of the State Lands Commission first had and obtained. Any such severance without State Lands Commission approval shall be grounds for termination of the lease by the State Lands Commission."

7. Oil Spill Emergency: In the event of a spill or leak of oil or other liquid pollutant into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services

via the toll-free 24-hour service telephone number 1-800-852-7550. For spill of 10 barrels or more, Lessee shall report directly to the State Lands Commission 24-hour service telephone number (213) 590-5201. Information to be reported shall include, but not be limited to:

The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the waterbody affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and action taken.

8. Marine Terminal/Wharf Operations: Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State Regulations and guidelines. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

9. Repossession: In the event of failure of Lessee to pay rental, or in the event of a breach of any other of the other covenants contained within the lease, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom, and to repossess and enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period period and to diligently pursue to conclusion the actions necessary to cure such default,

and, so long as such default is cured within the prescribed time limits, to the satisfaction of Lessor, Lessor shall not repossess the demised premises as provided herein.

10. Paragraph 10 of said Lease PRC 3454.1 is hereby deleted and the following substituted therefor:

"10. Rules and Regulations: (a) Lessee shall observe and comply with all rules and regulations now or hereafter promulgated by any governmental agency having authority by law.

(b) Lessee recognizes and understands in accepting this lease that his interest therein may be be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and be paid by the Lessee.

(c) Lessee covenants that all reasonable precautions will be taken to prevent pollution and contamination of the environment. Unabated pollution and contamination of the environment shall be grounds for termination of this lease."

11. Reservation of Rights: Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in Paragraph 3 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being Western Oil and Gas Association, et al. v. Cory, et al., U.S.D.C. (E.D. Cal.), No. Civ S-76-513 and Western Oil and Gas Association, et al. v. California State Lands Com-

mission, Sacramento Superior Court. No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of minimum annual rental as set forth in Paragraph 2(a) and 2(b)(3) hereof, in an interest-bearing special deposit account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee, subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the special deposit account. Notwithstanding the foregoing, in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Paragraph 2(a) and 2(b)(3) hereof. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered to impose a new reasonable rental retroactive to the beginning date of this lease.

All other terms and conditions of Lease PRC 3454.1 shall remain in full force and effect.

The effective date of this Agreement shall be and is July 26, 1979. This Agreement will become binding on the Lessor only when duly executed on behalf of the State Lands Commission of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated December 20, 1979]

[Subscriptions, acknowledgment and certificate omitted in printing]

[Remainder of Exhibit 3 omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Jan. 5, 1981]

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To Plaintiffs and their Attorneys:

Please take notice that on February 2, 1981, at 10:00 a.m., or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Philip C. Wilkins, United States District Judge, 650 Capitol Mall, Sacramento, California, defendants will move the court for entry of summary judgment against plaintiffs on each of their three claims.

Said motion is made upon the grounds that:

1. As to the Second Claim (Pendent Jurisdiction), this claim has been finally resolved against plaintiffs in the California state courts, and is therefore barred by res judicata.

2. As to the First Claim and Third Claim, there is no issue of material fact as to these claims, and defendants are therefore entitled to judgment as a matter of law.

Said motion is based upon this Notice of Motion and Motion, the brief filed herewith, the supporting declarations attached thereto, and upon all other pleadings, documents, and papers on file in this action.

Dated: January 5, 1981

George Deukmejian
Attorney General
N. Gregory Taylor
Assistant Attorney General

/s/ Dennis M. Eagan
Deputy Attorney General

Attorneys for Defendants

[Affidavit of service by mail omitted in printing]

AFFIDAVIT OF GARY R. HORN (EXHIBIT B TO DEFENDANTS' OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED JAN. 5, 1981 IN DISTRICT COURT)

State of California
County of Sacramento ss.

Gary R. Horn, being first duly sworn, deposes and says:

I am a land agent on the staff of the California State Lands Commission. My duties as a land agent in part consist in the negotiation of ground leases of State-owned land with private parties and the presentation of such leases to the State Lands Commission for approval. I perform appraisals in connection with these leasing activities. I am familiar with the types of State land leased by the Commission, the types of leases entered into, and the manner in which the rent to be charged for such leases is determined.

Certain classes of land are administered on behalf of the State of California by the State Lands Commission. Among them are tide and submerged lands, the beds of navigable lakes and rivers, school lands obtained by grant from the federal government, lands obtained by grant from the federal government in lieu of school lands ("lieu lands"), and swamp and overflowed lands obtained by grant from the federal government. All of these classes of lands are subject to issuance of ground leases by the State Lands Commission.

Leases issued by the State Lands Commission are classified according to the purpose of the lease. Among these lease classifications are industrial leases, right of way leases, and commercial leases. The industrial lease classification includes ground leases for marine terminal sites. The State leases referred to in the declarations filed with the Court in support of plaintiffs' renewed motion for summary judgment are marine terminal leases for the placement of piers, wharves, and appurtenant structures

upon state land. These leases give the lessee the right, for payment of rental, to appropriate to its exclusive use for a term of years discrete parcels of State-owned land.

The State Lands Commission employs various rental formats in the leases which it issues. One format used by the Commission is a flat yearly rent determined by applying a capitalization rate to the fee simple fair market value. For example, a parcel of State land having a fair market value of $500,000 might have applied to it a capitalization rate of 8 per cent, yielding an annual rent of $40,000. Other lease formats are also used. For pipeline right of way leases, as an alternative to the rental format just discussed, the Commission has charged a rental per annum of so many cents per diameter inch per lineal foot. For example, a pipeline 10 inches in diameter and 10,000 feet in length charged for at the current rate of 1½ cents per diameter inch per lineal foot would yield an annual rent of $1,500. The Commission also has issued "percentage" leases for commercial activities such as restaurants, marinas, and retail shops. In these leases, the minimum rent is determined by applying a capitalization rate against the appraised fee simple fair market value, and the Commission reserves as rent a stated percentage of the income derived from the business conducted upon the State land which is the subject of the ground lease. The flat minimum rent is applied against the rent due under the percentage of income provision of the lease. For example, with a parcel of State land having a fair market value of $100,000 and using a capitalization rate of 8 per cent, a minimum annual rent of $8,000 would be derived. An annual rent of 5 per cent of income might be provided for in the lease. With an income of $500,000, such a lease would yield $25,000. Minimum rent is paid in advance. In this example, the lessee would thus pay an additional $17,000 in rent during the course of, or at the end of, the lease year, having already been credited with the minimum rent payment of $8,000.

All of the above rental formats were in use by the Commission prior to 1976.

By amendments to its regulations adopted in 1976, the State Lands Commission authorized a variant of the percentage lease format to be used in determining rent for industrial and right of way leases, including leases for marine terminal sites. Under this latter format, rent may be charged based upon the volume of commodities passing over the leased State land. This is referred to as volumetric rental. For example, with a marine petroleum terminal site having a fair market value of $500,000 and using a capitalization rate of 8 per cent, a minimum annual rent of $40,000 would be derived. The volumetric rent might be 1 cent per barrel of oil until the minimum rent is reached, 1 mil ($.001) per barrel for the next 7 million barrels, 3 mils ($.003) per barrel for the next 20 million barrels and 6 mils ($.006) for each barrel thereafter. Assuming an annual volume of 25,000,000 barrels of oil passing over the leased land, the annual rent would be $89,000 ($.01 x 4 million bbls. = $40,000; $.001 x 7 million bbls = $7,000; $.003 x 14 million bbls. = $42,000; $40,000 plus $7,000 plus $42,000 = $89,000). The flat minimum rent of $40,000 would be paid at the start of the lease year and credited against volumetric rent due under the lease.

All of these various rental formats, including volumetric rental, are applicable alike to all varieties of land administered by the Commission, not just tide and submerged land; and all of the formats, including volumetric rental, are applicable alike to all lessees, regardless of whether they are engaged in intrastate, interstate, or foreign commerce. Neither are volumetric rentals applicable solely to petroleum and petroleum products; such rates apply to "commodities" generally. The Commission has several volumetric leases, for instance, pertaining to wharves for onloading and offloading sand and gravel.

I participated in the staff study of volumetric rentals conducted by the State Lands Commission, was present at the various public hearings concerning such rentals conducted by or on behalf of the State Lands Commission, and participated in meetings with representatives of the public utilities, common carrier pipelines, and the oil companies (including various of the plaintiffs in this lawsuit) concerning such rentals. These hearings and meetings resulted in various changes to the volumetric rental regulations initially proposed for Commission adoption in May 1975. I was present at the hearing before the State Lands Commission on April 28, 1976, at the conclusion of which the Commission adopted amendments to sections 2006 and 2007 of Title 2 of the California Administrative Code (now sections 2005 and 2006). These amendments provided guidelines for implementation of volumetric rentals for industrial and right of way leases. At this hearing, the staff introduced into the record of the proceedings, in support of its recommendation that the amendments be adopted, a report setting forth various factual and legal determinations in support of its recommendation. A true and correct copy of that report, entitled "Report of the State Lands Division on Volumetric Rental Rates Presented at State Lands Commission Meeting April 28, 1976," is attached as Exhibit 1 to this affidavit.

The State Lands Commission has to date approved volumetric rent for numerous marine terminal sites. I am participating in negotiations with certain other marine terminal lessees in which volumetric rent has been proposed by the Commission staff. The determination of the rent to be charged for such leases has proceeded, and I contemplate that it will proceed in the future, in the following manner:

1. A proposed annual minimum rent will be developed by the staff by appraising the fee simple fair market value of the leased land and applying a capitalization rate. The

figure thus arrived at has been, and will be, subject to negotiation with the lessee. This figure is particularly subject to negotiation because of the difficulty in appraising the fee simple fair market value of tide and submerged lands. Since 1909, section 7991 of the California Public Resources Code has banned sales of tidelands. A valuation approach based upon sales of comparable property must accordingly be abandoned in favor of less precise methods of valuation.

2. A proposed volumetric rent will be developed by the staff by considering similar charges being received by other public and private lessors for similar land, subject to adjustments in amount that may be indicated by the particular nature of the State land being leased, and by considering the criteria set forth in sections 2005(h) and 2006 of the Commission's regulations, including the actual and potential environmental damage inhering in the lessee's use of the land, and the extent to which such damage is quantifiable, as provided by section 2005(h)(2) of the Commission's regulations. Where appropriate, and based upon considerations such as efficient use of the State's land and the probability that a particular commodity, such as oil, may cause environmental damage if an accident occurs, a variable volumetric rate will be developed, with changes in rates occurring at various volume levels. The elements of the volumetric rent thus arrived at have been, and will be, subject to negotiation with the lessee.

3. The minimum rent in any lease so negotiated is a credit against the volumetric rent due under the lease. The volumetric rent is not a separate charge "over and above" the minimum rent, as may be implied in some of the declarations filed in support of plaintiffs' motion.

Volumetric rentals have been negotiated regarding marine terminal sites in the following situations: (a) where a lease rental is being negotiated for the first time; (b)

where a new lease rental is being negotiated in connection with a lease renewal; (c) where a revised rent is being negotiated pursuant to a five-year rent review provision contained in some leases; and where the lessee has asked for a lease amendment to change certain terms of the lease, such as the area leased. In no case has a volumetric rental been negotiated solely as consideration for the Commission approving an assignment of a lease. The Supplemental Declaration of Kenneth T. Palmer (¶ 5) and the Affidavit of Clinton B. Fawcett (¶¶ 4, 5), both submitted with plaintiffs' renewed motion for summary judgment, are inaccurate when they state that the volumetric rental negotiated for Lease PRC 3414.1 was agreed to as consideration for the approval by the Commission of the assignment of said lease from Gulf Oil Corporation to Pacific Refining Company. As appears from paragraph 2 of the lease executed by the Commission with Pacific's predecessor in 1965 (Exh. A to the Affidavit of Kenneth T. Palmer, which affidavit is attached as Exh. 1 to the Supplemental Declaration of Kenneth T. Palmer), no firm rental was negotiated when the property was first leased by the Commission. Such a firm rental still had not been negotiated by the time of the proposed assignment to Pacific in 1976. A firm rental was negotiated contemporaneously with the assignment and took the form of an amendment to the lease. Both the consent to assignment and the amendment, providing for the firm rental, are attached as Exhibits C and D to the Affidavit of Clinton B. Fawcett, which affidavit is attached as Exhibit 2 to the Supplemental Declaration of Mr. Palmer.

The volumetric rates negotiated by Commission staff with marine terminal lessees are considerably below similar charges by other public and private lessors. For instance, the Port of Los Angeles currently charges 3.6 cents per barrel wharfage for oil transferred between a vessel and a storage area through a private pipeline and 7.2 cents per

barrel for petroleum products transferred to a vessel from a barge where the vessel was not loaded at the Port of Los Angeles.

I participated in the negotiations that led to agreement on volumetric rentals for each of the leases mentioned in the declarations filed with plaintiffs' renewed motion for summary judgment. In no sense were the minimum rent or the volumetric rent for those leases unilaterally imposed by the State Lands Commission or its staff. The minimum rent and the volumetric rent were negotiated and compromised with each lessee in the following respects:

1. The volumetric rates initially proposed by the Commission staff were in each case reduced after negotiation, with the result that total rent under the leases was decreased.

2. The volume levels initially proposed by the Commission staff at which different volumetric rates would become operative were in each case altered after negotiation, with the result that total rent under the leases was decreased.

3. The fee simple fair market value for the leased property initially proposed by the Commission staff was in each case reduced after negotiation, thus resulting in a lower minimum rent in each instance. For each of said leases, the negotiated reductions in fee simple fair market value were as follows:

Lease	Value Appraised by SLC	Value Agreed Upon
1. PRC 600.1 (Union)	$ 658,000	$ 512,500
2. PRC 236.1 (Chevron)	$1,437,480	$1,293,000
3. PRC 3453.1 (Tosco)	$ 700,000	$ 525,000
4. PRC 3454.1 (Tosco)	$ 417,000	$ 375,000
5. PRC 4908.1 (Shell)	$ 755,000	$ 750,000
6. PRC 3414.1 (Pacific Refining)	$ 560,000	$ 406,250

The negotiations with reference to the volumetric rentals for each of the above-referenced leases involved concessions on both sides and resulted in mutually agreed-upon rentals considerably lower than those originally proposed by Commission staff. In none of these instances did negotiations break off and the lessee seek a court determination that the rental proposed by Commission staff was unreasonable and thus inconsistent with the terms of the applicable lease pursuant to which the rental renegotiations took place.

/s/ Gary R. Horn

Subscribed and sworn to
before me this 31st day of
December, 1980.
/s/ Diane R. Jones

Notary Public in and for said County
and State

[Seal]

Exhibit 1

REPORT OF THE STATE LANDS DIVISION ON VOLUMETRIC RENTAL RATES PRESENTED AT STATE LANDS COMMISSION MEETING APRIL 28, 1976

INTRODUCTION

The matter of volumetric rental rates has been pending before the State Lands Commission for approximately one year. Although the concept of such a rental option was approved by the Commission at the May, 1975 meeting, the specific guidelines for its implementation have been the subject of extensive inquiry in the last year. The purpose of this report is to summarize the results of that inquiry and to explain the basis for the staff's recommendation that the proposed regulations, as revised, be adopted by the Commission.

I. SUMMARY OF PROCEEDINGS

A. Chronology

In mid 1974, the Division began a review of leasing regulations with the purpose of recommending appropriate revisions to the Commission. Hearings were conducted in Sacramento on April 29, 1975 and in Long Beach on May 2, 1975. The staff recommendation, including volumetric rental charges, was presented to the Commission at its May, 1975 meeting. The oil and gas companies, the utility companies, the common carrier pipelines, and the Western Oil and Gas Association strongly protested the volumetric rental schedules.

The Commission deferred action on the volumetric rental schedules and directed the staff to hold additional public hearings on the matter. During June, 1975 all organizations which would be affected by volumetric rental schedules

were canvassed by letter inviting comments or suggestions. In addition staff meetings were held with public utilities on July 22, 1975; common carriers on July 23, 1975; and the oil industry on July 31, 1975. Summaries of all these events are contained in work order W 5125.8.

After the informal meeting in the summer of 1975, staff continued working closely wtih the Office of the Attorney General to determine the appropriateness of the volumetric charges initially proposed. To that end, the Attorney General retained a valuation consultant familiar with special use property appraisals. Division staff and the consultant continued to investigate the leasing practices of the major California ports; examined numerous right of way leases issued by public and private entities; and generally conducted a search of data relating to the leasing of similar lands.

As a result of this extended inquiry, the staff has proposed certain alterations in the regulations initially proposed in May, 1975. The staff held another hearing on the latest version of these proposed regulations in Sacramento on April 21, 1976.

B. Substance of Comments Received and Information Developed

Some of the points brought out by those directly affected by the initially proposed volumetric charges at the April and May 1975 hearings and the summer 1975 informal meetings included: (1) that the initially proposed schedule would result in a rental rate being charged several times on the same product; (2) that there was a potential for cumulative effect if the State adopted a rental based on a volumetric charge. Other land owners might well charge on the same volumetric basis, with the result being prohibitively-high transportation costs; and (3) that there was no precedent for imposition of a volumetric charge; and

(4) that the proposed fixed rental schedules would result in arbitrary, discriminatory and unjustifiable rentals being imposed by the Commission.

There were a number of legal arguments advanced in opposition to the regulations proposed for adoption last year. They were: (1) that section 6503 of the Public Resource Code requires that lease rentals be based upon the appraised value of the land, and the proposed charges based upon the volume of commodities passing over State land had no basis in commonly-accepted appraisal practices; (2) that the proposed changes in rental charges required the preparation of an environmental impact report under the California Environmental Quality Act (CEQA), and no EIR had been prepared; (3) that the proposed charge constituted both a tax on imports and a duty on tonnage, and was, therefore, invalid under the provisions of the United States Constitution; and (4) that the proposed charge constituted an unreasonable burden upon interstate commerce in violation of the United States Constitution.

Some of these same factual and legal arguments were presented at the April 21, 1976 hearing. In addition, it was argued that the omission of a fixed schedule from the revised proposed regulations was too vague, and did not permit those affected to calculate in advance the rental that might be asked by the Commission for an industrial or right of way lease on a particular parcel of State land.

Among the important conclusions derived from the inquiry conducted in the last year is that a rental charge for the use of unimproved land based directly or indirectly upon the volume of commodities passing over such land is not a new or novel concept. All of the following situations involve such a volumetric charge:

(1) Private landowners frequently charge for logging road rights of way based upon the board-feet of logs

transported over the road. The responsibility for road construction and maintenance is generally the responsibility of the timber company, not the landowner.

(2) There is evidence that a per-ton "throughput" charge has been imposed for use of rights of way across private land for the transportation of coal.

(3) The City of Seal Beach, in return for a franchise to use city streets and public places for oil pipelines, charges Exxon two percent of the royalty paid to the State on the offshore oil and gas lease which the pipelines serve.

(4) A private lease originally entered into by the Hollister Estate Company, in return for the use of pipeline rights of way, charges two percent of the royalty paid to the State on the offshore oil and gas lease located nearby. The revenue under both the franchise and the private lease varies indirectly with volume.

(5) A portion of the wharfage charge imposed by ports for the offloading of cargo on port land represents a "throughput" charge for the use of unimproved land.

(6) Similarly, it appears that a portion of the throughput charges imposed by pipeline operators for the use of their pipelines necessarily goes to recover, and to obtain a return upon, right of way costs.

(7) Franchises granted by public agencies under the Broughton Act and the Franchise Act of 1937 for the laying of transmission lines and pipelines of various types are often charged for based upon a percentage of gross receipts.

This franchise fee is, in effect, a rental which can vary according to the amount of the product or commodity put through the transmission facilities which are the subject of the franchise.

(8) Percentage leases are another form of variable rental lease where the amount of the rental is influenced by volume—in this case the volume of goods sold.

II. ANALYSIS

Each of the factual and legal arguments raised in opposition to the revision in rental charges proposed last year has been given careful review. In addition, the staff and the Attorney General, with the aid of a consultant, have conducted their own expanded inquiry into the factual and legal matters bearing on the validity of a volumetric rental charge. Many of the criticisms raised at the formal hearings and the subsequent informal meetings with affected groups have resulted in revision of the amended regulations originally proposed for adoption. Certain other factual and legal arguments were found to be without merit.

In summary, the revised proposal for amendment of the Commission's leasing regulations is based upon the following staff determinations: (1) that a land rental varying with the volume of commodities passing over unimproved land has been employed by other lessors in similar situations; (2) that such a volumetric rental, if otherwise reasonable under all the circumstances, may be employed as one of the alternative rental bases used by the Commission; and (3) that instead of adopting an inflexible schedule of volumetric rental rates uniformly applicable to widely varying factual situations it is preferable to approve the volumetric rental concept merely as one of several alternative rental options available for use by the Commission, at the same time providing the Commission with a set of criteria for its guidance in applying this rental concept.

The Commission has authority under section 6503 of the Public Resources Code to adopt such a volumetric rental charge. The requirement of an appraisal in section 6503 does not mean that the rental must be derived from a conventional appraisal; nor does it mean that the Com-

mission is limited to charging as rent an annual percentage of appraised value. The section provides that: "the Commission shall appraise the lands and fix the annual rate or other consideration therefor . . .". The Commission has interpreted this language broadly to permit percentage leases as well as pipeline right of way leases charged for on the basis of diameter and length of the pipeline.

The staff has overcome some of the criticisms of the regulations initially proposed in this recommended revision. Regarding the problem of a single pipeline crossing several different parcels of State land, a volumetric charge will not be imposed for each passage over State land; rather, the charge will be apportioned in the proportion that the length of pipeline over State land bears to the total length of the pipeline. (See proposed section 2007 (b)(2)). Any precedent established by a volumetric rental charge will therefore include the concept of apportionment.

Similarly, the staff's recommendation specifically responds to the problem of double charging for the same commodity upon its repassage over State land. (See proposed section 2007(b)(1)).

The staff does not agree that the absence of a specific and inflexible schedule makes the proposed regulations unreasonably vague. Many of the rental options set forth in the existing regulations do not permit calculation by a prospective lessee of the rental which he will have to pay for a given lease. With a rental based on eight percent per year of appraised value, appraisals can vary widely, particularly with tide and submerged land, for which there is no definitive market data. The companies who are protesting the alleged "vagueness" of these rental regulations know quite well that the same flexibility is inherent in the existing means of determining a rental rate on, for instance, a marine terminal site. Case by case negotiations

have worked well in this admittedly difficult area of marine terminal site appraisals, and we see no reason why a similar approach, governed by specific guidelines and limitations, should not work well in negotiating volumetric rentals. This approach is no different than that used by the ports: each lease is subject to negotiation; there is no uniformly applicable set of rates or lease provisions which are used by the ports in negotiating individual leases.

The arguments questioning the constitutionality of the proposed regulations may be distilled down to this: the Commission may not exact an unreasonable charge for the use of State lands from those engaged in interstate commerce. The arguments that volumetric rentals for the use of Sate land would constitute "taxes" or "duties on tonnage" we find to be without merit. Regarding reasonableness, there is nothing per se unreasonable about such a volumetric rental charge. As indicated, it is not a novel concept. Specific rates, of course, might be unreasonable, but specific rates have been left to future negotiations between particular lessees and the State, where a wide range of factors can be taken into consideration to insure that a volumetric rate, if imposed, is particularly suited to the situation at hand, and hence reasonable. One of the potential vices of the initial regulations considered by the Commission was the inflexibility of the rate schedule. Under that schedule, the same rate might be applied to situations where land value or potential environmental impact varied widely. The staff has concluded that this is an undesirable result and that lease by lease negotiation, as is now employed with marine terminal sites, is the preferable approach.

Regarding the argument that preparation of an environmental impact report is a necessary preconditon to Commission action on the proposed regulations, the staff feels that removal of a specific rate schedule removes the basis for any possible contention that an EIR is required. Ap-

proval of a volumetric rental concept in the abstract generates no significant environmental effect. Indeed, the general concept of a volumetric rental charge has been part of the Commission's regulations since June 1975 and has gone unchallenged on environmental grounds. Further, one of the guidelines for Commission selection among rental alternative and rates is whether a particular rental would compel use of substitute facilities by prospective lessee. If, at some time in the future, the Commission should insist upon a rental rate that might compel selection of a substitute facility by the prospective lessee, that would be the appropriate time for the assessment of the environmental impact of the proposed rental rate. At this point, it is meaningless to speculate about environmental impacts that may never occur. If they should occur, they will not occur as a result of Commission action in adopting these regulations, which do nothing more than adopt guidelines for a rental option already approved in principle by the Commission in its regulations.

A brief word is appropriate regarding prior staff evaluations of a volumetric rental concept. In January 1974, the Auditor General issued a report critical of the Commission's leasing practices for marine terminals, concluding that the Commission's appraisals for these sites were arbitrary, and recommending that a minimum charge of one cent per barrel be imposed for those terminal sites used for the transfer of petroleum and related products between ship and shore. The Auditor General's proposal did not encompass right of way leases or industrial leases generally. In response to this report, the Commission in April 1974 evaluated the Auditor General's criticism and recommendation and determined that the criticism was unfounded and that the recommendation should not be adopted. The more recent and extensive inquiry conducted by the staff and by a consultant retained by the Attorney General has confirmed that much of the staff's criticism of the Auditor

General's report was well-taken. However, the recent inquiry has also demonstrated that some of the factual bases for the staff's criticism of the recommendation were inaccurate. Finally, many of the staff's concerns at that time have been obviated in the amended regulations now proposed for adoption by the Commission.

The staff remains critical of the Auditor General's recommendation of a minimum volumetric charge limited to marine petroleum terminal leases which would in all cases exceed that charged by ports for the following reasons: the Commission limitation of such a charge to one type of industrial lease could expose the Commission to charges of discrimination in its leasing practices; it cannot be said that petroleum marine terminal sites offered by the State are without exception superior to those offered by ports, thereby warranting a uniformly higher rental; and from a pure appraisal standpoint, it would be difficult to justify a minimum one cent per barrel charge that applied to every lease, regardless of the individual factors that might pertain to a particular lease. The proposed amendment to the regulations deals with these past staff criticisms by expanding the applicability of a volumetric rental concept to include all industrial leases, as well as right of way leases.

On the other hand, some of the staff's past factual premises in criticizing the Auditor General's recommendation have been revealed as inaccurate by the recent inquiry of the staff and the Attorney General's consultant. For instance, it is not true that the volumetric charges imposed by ports are limited solely to a recovery of the cost of improvements, or that port facilities are always provided by the ports themselves, or that what the State offers its terminal lessees is uniformly of less value than what is offered by ports. On the contrary, it appears that an element of the "throughput" charge imposed by ports repre-

sents a recovery on unimproved land; that such charges are imposed after improvement costs have been recovered; and that, with the advent of supertankers, the deeper waters which the State can offer for offshore anchorage may in fact be superior in some instances to the shallower harbor facilities provided by the ports. In short, the practice of the ports *does* provide a "precedent", if one were needed, for charging rental for unimproved land based upon a volumetric principle, and there may indeed be instances where a higher volumetric charge by the State than that charged by a port would be justifiable.

Finally, the staff's earlier reservations regarding possible cumulation of charges on the same commodity have been disposed of by alteration of the regulations to avoid this potential.

III. CONCLUSION

In the staff's judgment, the proposed regulations, as revised, have a sound basis in fact and law. We recommend that they be adopted by the Commission.

AFFIDAVIT OF DENNIS M. EAGAN (EXHIBIT C TO DEFENDANTS' OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED JAN. 5, 1981 IN DISTRICT COURT)

State of California
City and County of
San Francisco
ss.

Dennis M. Eagan, being first duly sworn, deposes and says:

I am a Deputy Attorney General of the State of California and one of the attorneys representing the defendants in this action. I have been involved as an attorney in all phases of this action. I also represented the California State Lands Commission in all phases of the related state court litigation that arose as a result of this court's abstention order, being Western Oil & Gas Association, et al. v. California State Lands Commission, Sacramento Superior Court No. 267822, which is the subject of the appellate court decision in Western Oil & Gas Assn. v. State Lands Com- (1980) 105 Cal.App.3d 554.

A true and correct copy of the Amended and Supplemental Complaint filed by plaintiffs in said superior court action is attached hereto as Exhibit 1.

A true and correct copy of the Judgment entered in said superior court action is attached hereto as Exhibit 2.

/s/Dennis M. Eagan

Subscribed and sworn to before me
this 2nd day of January, 1981.
Ruth M. Cummings
Notary Public in and for said City
and County and State

[Seal]

Exhibit 1

Superior Court of the State of California
for the County of Sacramento
No. 267822

Western Oil and Gas Association,
Pacific Refining Company, Edgington Oil Company,
Atlantic Richfield Company, Exxon Corporation,
Getty Oil Company, Tosco Corporation, Shell Oil Company,
Chevron U.S.A. Inc. and Union Oil Company
of California, Plaintiffs,

vs.

California State Lands Commission, Defendant.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Tosco Corporation, (formerly Lion Oil Company), Shell Oil Company, Chevron U.S.A. Inc., and Union Oil Company of California by this verified, amended and supplemental Complaint allege as follows:

FIRST CAUSE OF ACTION
(Injunctive Relief)

1. Plaintiff Western Oil and Gas Association ("WOGA") is a corporation organized under the California non-profit corporation law. Its principal place of business is Los Angeles, California. Plaintiffs Chevron U.S.A. Inc., Edgington Oil Company and Union Oil Company of California are corporations duly organized under the laws of the State of California. Plaintiffs Exxon Corporation, Getty Oil Company, Pacific Refining Company, and Shell Oil Company are corporations duly organized under the laws of the State of Delaware. Plaintiff Atlantic Richfield Company is a corporation duly organized under the laws of the Common-

wealth of Pennsylvania. Plaintiff Tosco Corporation, formerly Lion Oil Company, is a corporation duly organized under the laws of the State of Nevada. All the foregoing companies are legally qualified to do and are doing business in the State of California.

2. Defendant State Lands Commission ("SLC") is a commission created by the laws of the State of California, and as such is authorized to sue and may be sued.

3. The principal office of the SLC is located in this County and all, or substantially all, of the acts complained of herein took place in this County.

4. The State of California, and its political subdivisions, hold, under grant from the United States under the Submerged Lands Act (43 U.S.C. 1311 and 1312), title to tidelands and submerged lands beneath the navigable waters of the United States from the Mexican border on the south, to the border of the State of Oregon on the north, and from its coastline to a point three geographical miles out to sea. In addition, the State of California holds title to submerged lands, beneath streams and other navigable waters, within the State.

5. The SLC has authority by statute to administer and control State tidelands and submerged lands, beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits. It may lease such lands as provided by law. Before such a lease may be entered or renewed it must be authorized by the SLC.

6. Those wishing to lease lands owned by the State must apply to the SLC for such a lease. Upon receipt of such an application to lease State lands the SLC is directed by § 6503 of the California Public Resources Code to "appraise the lands and fix the annual rental or other consideration therefor . . . ." Under this section the rental to be

charged for any particular lease must be based on the appraised value of the land leased.

7. California tide and submerged lands are used, *inter alia*, for wharves, at which tankers are moored, and for similar facilities over which petroleum, petroleum products and other commodities are transported by pipeline and otherwise, and for mooring facilities placed offshore and connected by pipeline and hose with tankers. Petroleum, petroleum products, and other commodities in intrastate, interstate and foreign commerce are transported by pipeline to and from said tankers and otherwise across such facilities and across, or under, state lands. California tide and submerged lands are also used for pipelines to and from petroleum producing platforms on state tide and submerged lands and in Federal areas beyond the three-mile limit on the outer Continental Shelf, which pipelines traverse California tide and submerged lands and are used for the transportation of oil and gas in interstate commerce.

8. California's tide and submerged lands, including those held by political subdivisions, are so located that it is virtually impossible (a) to transport petroleum or other products by ship or barge to or from other states or foreign countries and into or out of California without traversing such lands; (b) to transport oil and gas or other products by pipeline from state tide and submerged lands and from the outer Continental Shelf to the landward portions of the State of California without traversing such lands; and, (c) to engage in intrastate commerce by ship or barge from one portion of the State to another without traversing such lands and without utilizing wharves upon said property.

9. The SLC, in its capacity as administrator of California's tide and submerged lands, has made such lands available for the construction of wharves and similar

facilities, and pipelines, for use as is set forth under paragraph 7 above. The State provides no facilities or services under such leases but merely provides unimproved land. At all times, to and including at least the 28th day of April, 1976, it was the practice of the SLC, pursuant to its regulations, to make said lands available by lease, and to collect a rental for such leases based on a reasonable return on the appraised value of the land leased and on the amount of land occupied by any pipeline.

10. At its April 28, 1976, meeting the SLC amended its regulations to provide for the charging of "rentals" based not on the value of the land provided by the State but rather on the volume of commodities passing over State land. Such a "rental" is known as a throughput charge. A true and complete copy of said amendments is attached hereto as Exhibit "A" and incorporated herein by this reference.

11. The above-referenced regulations, in allowing for rentals on a throughput basis, are in excess of the authority of the SLC and as such are invalid under the laws of the State of California for the following reasons:

(a) Pursuant to such regulations the "rental" to be charged for the use of State lands is as follows: 8% of the fair market value of the leased land, as determined and agreed by both lessor and lessee, and an additional surcharge based upon the volume of commodities passing over the leased lands, which volume is in no way related to the value of such land, *i.e.*, neither the value of the land nor the burden imposed on the land is in any way changed by reason of differences in the volume of commodities passing over such lands via pipeline or otherwise; and,

(b) they contravene the provisions of the Tidelands Trust, which provides that the SLC is a public trustee of tide and submerged lands and in that capacity is

obligated to foster and not impede commerce. (*see, e.g., City of Long Beach v. Mansell*, 3 Cal.3d 462 (1971); *Colberg Inc. v. State of California*, 67 Cal.2d 408 (1967); *Higgins v. City of Santa Monica*, 62 Cal.2d 24 (1964); *Boone v. Kingsbury*, 206 Cal. 148 (1928); *Lane v. City of Redondo Beach*, 49 C.A.3d 251 (1975); *Martin v. Smith*, 184 C.A.2d 571 (1960);

12. The above referenced regulations, in allowing for rentals on a throughput basis, are unreasonable, arbitrary and capricious in the following respects:

(a) particularly for those leases of SLC-leased land contiguous to private land on which lessees have constructed improvements, they result in imposing exorbitantly high charges for the use of State lands, as compared to the value of that land, by trading on the virtual monopoly position occupied by the State over such lands;

(b) they inevitably lead to and have, in fact, resulted in annual rentals grossly disproportionate to the appraised value of the leased lands. In certain cases the leases provide for an annual charge of over 25% of the assessed value of the land;

(c) they allow for discriminatory and unequal treatment of lessees in that rentals charged on leases of substantially identical amounts of land in the same general location will be allowed to vary greatly depending on factors, i.e., the volume of commodities passing over such lands, which are in no way related to the value of that land or to services rendered by the State;

(d) they give the SLC the discretion to and the SLC has charged different rates of throughput for similar lands, which rates are unrelated to the value of the land or to services rendered by the state.

(e) they are totally unsupported by and are contrary to the evidence contained in the Administrative Record.

13. Such throughput charges bear no relationship to the value of services rendered or benefits foregone by the State and as such are further invalid under the Constitution of the United States, wherein it is provided that a State may not impose any of the following charges:

(a) Under Article I, Section 10, of the Constitution of the United States, the State may not impose, without the consent of Congress, any tax, duty, impost or other charge upon the importation of merchandise, including crude or refined petroleum, into the United States.

(b) Under Article I, Section 8, of the Constitution of the United States, California may not impose any undue burden upon foreign or interstate commerce.

(c) Under Article I, Section 10, of the Constitution of the United States, the State of California may not, without the consent of Congress, impose any duty of tonnage upon any vessel or cargo. A tonnage duty is a charge placed for the privilege of anchoring a vessel, or tying a vessel to a dock, or upon the value or amount of merchandise or commodities transported through, on or over California tide and submerged lands to the shore, if such charge is not based upon the value of facilities constructed by the state.

California has not received the requisite consent of Congress to impose any of the above-type charges. Plaintiffs herein presented these Constitutional questions, along with the state law questions raised herein, to the United States District Court for the Eastern District of California, case number CIV. S-76-513 PCW, in a complaint filed September 27, 1976. That Court, in response to a motion by defendants, exercised its discretionary power of absten-

tion and, by Order dated May 19, 1977, stayed further proceedings in that Court on the Constitutional issues raised pending a resolution of the state law issues raised herein by the State courts. By this action we do not ask this Court to rule on these Federal Constitutional questions and we specifically reserve those questions for the federal courts should a ruling thereon ever become necessary.

14. Pursuant to these regulations the SLC has demanded, and on information and belief will continue to demand, as leases come up for renewal, are made for the first time, or as lessees seek consent for modifications or assignments of leases, that such leases provide for "rentals" based not only on the appraised value of the unimproved land leased but, in addition, based on the volume of commodities passing over such lands.

15. The imposition of such throughput charges has resulted and will continue to result in charges for the use of State lands that far exceed a rental based upon the reasonable return on the value of that land.

16. Plaintiff WOGA's membership includes oil companies which perform in excess of 75% of the production, transportation, refining and marketing of crude petroleum in the Western United States and in California. Its members own and maintain crude petroleum, natural gas, and refined petroleum product pipelines located in the California tide and submerged lands which carry domestic and imported crude petroleum and refined petroleum products in intrastate and interstate commerce, wharves, anchorages and similar facilities at which tankers are moored and over which various commodities pass, all as described above. It is not possible for said oil companies to transport said commodities without utilizing said tide and submerged lands for the reason that, as aforesaid, said areas extend from the border of Mexico to the Oregon border. WOGA

brings this action on behalf of its members for the reason, *inter alia*, that a comprehensive determination of the validity of the system established by defendants is essential. WOGA has been duly authorized to bring this action.

17. (a) Plaintiff Pacific Refining Company ("Pacific") is the owner of a refinery, formerly owned by Sequoia Refining Corporation ("Sequoia") in 1976. Said refinery is served by facilities, at which vessels are moored and loaded and unloaded in interstate and foreign commerce, located on land under lease from the State of California. Said lease was originally issued to Sequoia and contained a clause forbidding assignment without the consent of the SLC. Defendant required Pacific to agree to a throughput charge based upon the amount of products going through said facilities as a condition to its consent to the assignment of the lease on said land. Pacific was compelled under protest to agree to such charges in order to be able to receive and ship cargoes without which it could not operate its refinery. The actual rental charges since the regulations were enacted have been as follows; 1976-1977: 89,284.47; 1977-1978: $93,806.02. Based on the SLC appraisal, the rate of return for the first two years has been 28% and 29% respectively. Pacific will pay over the 10-year life of the lease over 280% of the value of the land, which amounts vastly exceeds the reasonable rental value.

(b) Plaintiff Union Oil Company of California ("Union") holds leases administered by the SLC at various points in California, and will, in the ordinary course of business, continue to require such leases for importation of crude oil for use in its refineries, and for the transportation in interstate and foreign commerce of crude and refined petroleum. Amendments to a lease entered into in 1978 for wharf facilities serving Union's Contra Costa County refinery will require Union to pay rental charges of approximately $92,000 each year for the first five years of its lease and approximately $113,000 each year for the remaining five

years of its lease. This results in an annual net return on appraised value to the SLC of approximately 18% and 22% respectively, which amount far exceeds the reasonable rental value of the land under lease.

(c) Plaintiff Tosco Corporation ("Tosco") holds a lease administered by the SLC on which it has located wharf facilities used to transport coke and other commodities substantially all of which are in interstate and foreign commerce. In March of 1976 said lease was renewed for a 10-year period and amended to, among other things, fix an annual rental on said lease in the amount of $9,266.40. Said rental figure, as reflected in the Minutes of the SLC, was viewed by the SLC as the fair rental value of such property. Said renewal and amendment further provided, at the SLC's insistence, that the State could reset the rental on said lease at any time prior to February 28, 1977, to conform with any changes or additions to the SLC's rental regulations as might be promulgated. Pursuant to letter dated July 29, 1976, the SLC demanded a throughput charge on said lease in the amount of five (5) cents per ton of any and all bulk commodities passing over the wharf. Said letter further demands a minimum annual rental of $9,266.40. The effect of the throughput charge demanded by the SLC will, based on past experience, increase the rental on said lease in an amount two to three times that which the SLC has previously determined, only a few months prior to its July, 1976, letter, as the fair rental value on such property.

(d) Plaintiff Tosco also owns a refinery in Contra Costa County, California, which refinery Lion Oil Company acquired in 1976 from Phillips Petroleum Company ("Phillips"). (Lion merged with Tosco in February 1978.) Said refinery is served by facilities located on land under lease from the State of California, known as Amoco Wharf, at which vessels are moored and loaded and unloaded in interstate and foreign commerce. In May of 1977, said lease (also acquired from Phillips in 1976) was renewed for a

ten (10) year period and amended to, among other things, fix a minimum annual rental in the amount of $42,000.00. The annual rental negotiated in 1974 on this same lease was $14,544.14. Defendant required Tosco to agree, as a condition to its consent to said renewal and amendment, to a throughput charge based upon the amount of products going through said facilities. Tosco was compelled under protest to agree to such throughput charges in order to be able to receive and ship cargoes without which it could not operate its refinery. Under the new lease provisions Tosco will be required to pay approximately $66,000 each year for the first five years of the lease. The lease provides that the terms will be renegotiated for the remaining five years. This amounts to annual rent of about 12.5% of the appraised value of the land for the first five years alone.

(e) Plaintiff Chevron U.S.A. Inc. ("Chevron") holds a lease administered by the SLC adjoining property owned by Chevron and on which Chevron owns and operates a refinery. Chevron's refinery investment is in excess of 723 million dollars. It is indispensable that Chevron be able to use the SLC leased lands to run the refinery. On January 26, 1978 Chevron agreed to an extension of the SLC lease until August 18, 1987. Based on the state's appraised value of the leased premises, the SLC will receive an average annual net rate of return for each year of the extension in the amount of 21.5%, ranging from a low in 1978 of 17.275% to highs for 1984, 1985 and 1986 of over 24.18%. These rental charges constitute an unreasonable return to the State and are in excess of the normal and reasonable return for industrial land leases.

(f) In challenging the validity of the regulations as they have been applied by the SLC, plaintiffs place in issue only those leases specifically alleged in sub-parts (a)-(e) hereof and do not purport to raise issues concerning the reasonableness of specific rental rates for any lease not specifically covered by this amended and supplemental complaint.

18. Plaintiffs Atlantic Richfield Company, Edgington Oil Company, Exxon Corporation, Getty Oil Company and Shell Oil Company, each hold leases or easements from the State of California administered by the SLC. Said leases or easements will come up for renewal at various times in the future. As each of them matures, the SLC proposes, on information and belief, to require a throughput charge which will apply to imports and to intrastate, interstate and foreign commerce as to each of said leases or easements. The amounts involved are many millions of dollars per year and will far exceed the reasonable rental value of such lands. In each instance, such facilities are essential to the operation of refineries, terminals, production facilities and other basic parts of plaintiffs' businesses.

19. The foregoing allegations of paragraphs 17 and 18, while speaking in terms of interstate and foreign commerce, as well as intrastate commerce, are not designed to put the Constitutional issues referenced in paragraph 13 herein in issue.

20. As a result of the implementation of these regulations, members of plaintiff WOGA, including the other plaintiffs herein, are being forced, and will continue to be forced, due to the virtual monopoly exercised by the State on the lands subject to such leases, to pay said unlawful charges to the State.

21. Plaintiffs have exhausted all their administrative remedies.

22. Plaintiffs have no plain, speedy and adequate remedy at law. The enforcement of this regulation, unless enjoined, will force WOGA members, including the other plaintiffs herein, to enter into leases containing unlawful throughput charges and to pay unlawful charges in the amounts of millions of dollars per year, no part of which may ever be recovered.

SECOND CAUSE OF ACTION
(Declaratory Relief)

23. Plaintiffs incorporate herein by reference paragraphs 1 through 22 of their First Cause of Action.

24. An actual controversy has arisen and now exists between plaintiffs and defendant concerning the validity of defendant's throughput rental regulations. Defendant asserts that such regulations are valid and lawful and plaintiffs assert them to be invalid and unlawful. Plaintiffs are entitled to a judicial declaration regarding the validity of these regulations.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid as written;

2. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid as applied to the specific leases alleged in paragraph 17;

3. For a preliminary and permanent injunction against defendant's enforcement of such regulations, Exhibit "A" hereto, and specifically prohibiting its demanding and collecting rentals pursuant to such regulations, generally and with respect to the leases alleged in paragraph 17;

4. For costs of suit herein; and,

5. For such other relief as the Court deems appropriate.

DATED: January 25, 1979.

Ingoglia, Marskey & Kearney
McCutchen, Black, Verleger & Shea
Philip K. Verleger
Max K. Jamison
Betty-Jane Kirwan
Michael M. Johnson
By /s/ BETTY-JANE KIRWAN
Attorneys for Plaintiffs

[Verification, Exhibit "A," and proof of service by mail omitted in printing. For text of regulations as originally amended, see J.S. App. H, p. A-38. For current text of regulations, see J.S. App. G, p. A-29.]

Exhibit 2

Superior Court of the State of California
County of Sacramento

No. 267822

Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Tosco Corporation, Shell Oil Company, Chevron U.S.A. Inc., and Union Oil Company of California,
Plaintiffs,

v.

California State Lands Commission,
Defendant.

[Endorsed Mar. 15, 1979]

JUDGMENT

The Court having previously issued its Order on Cross-Motions for Summary Judgment in this matter, and that Order having provided for entry of judgment in favor of defendant,

NOW, THEREFORE, IT IS HEREBY DECLARED AND ADJUDGED:

1. That sections 2005 and 2006 of the regulations of defendant California State Lands Commission (Cal. Admin. Code, tit. 2, §§ 2005, 2006, formerly §§ 2006, 2007), which authorize rentals based upon the volume of commodities passing over the leased land, are lawful and valid.

2. That the following leases of defendant, which are referred to in paragraph 17 of the Amended and Supplemental Complaint, are lawful and valid insofar as they provide for specific rentals and rental formulas based upon the volume of commodities passing over the leased land:

(a) Lease P.R.C. 3414.1 (plaintiff Pacific Refining Company, lessee);

(b) Lease P.R.C. 600.1 (plaintiff Union Oil Company of California, lessee);

(c) Lease P.R.C. 3453.1 (plaintiff Tosco Corporation, lessee); and

(d) Lease P.R.C. 236.1 (plaintiff Chevron U.S.A. Inc., lessee).

3. That plaintiffs, and each of them, be, and hereby are, denied any injunctive relief whatsoever.

4. That, except for the declarations contained in paragraphs 1 and 2 above, plaintiffs, and each of them, take nothing by this action.

5. That defendant be, and hereby is, awarded its costs of suit against plaintiffs, jointly and severally, in the amount of $.

Dated: March 15, 1979.

Lawrence K. Karlton
Judge of the Superior Court

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Feb. 12, 1981]

ANSWER

In answer to the complaint, it is admitted, denied, and alleged as follows:

First Claim

1. Answering paragraph 2, it is admitted that, on April 28, 1976, the California State Lands Commission (hereinafter "Commission"), at that time consisting of State Controller Kenneth Cory, then State Lieutenant Governor Mervyn M. Dymally, and then State Director of Finance Roy M. Bell, adopted amendments to the ground lease regulations of the Commission which included among the types of rent authorized by said regulations a type of rent based upon the volume of commodities passing over the leased land. No specific rates were included in the amendments. This volumetric rental mode is applicable to commercial, industrial, and right of way leases and applies to all types of land administered by the Commission. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

2. Answering paragraph 4, the allegations of the first and last sentences are admitted and it is admitted that Kenneth Cory is the chairman of the Commission. Each and every one of the remaining allegations of said paragraph is denied.

3. Answering paragraph 6, it is admitted that the State of California (hereinafter "State") holds title to some uplands, some tide and submerged lands, and some submerged lands beneath streams and other navigable waters, within the State; and that some cities, counties, districts, other public agencies, and private persons hold title to some of

the remaining portions of each type of land listed above. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

4. Answering paragraph 7, it is admitted that the Commission has authority by statute to lease those tide and submerged lands and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits that are owned by the State, and that such leases must be authorized by the Commission. Except as expressly herein admitted, each and every allegation in said paragraph is denied.

5. Answering paragraph 3, it is admitted that tide and submerged lands located within California are used for wharves, other permanent mooring facilities, and pipelines from offshore federal oil and gas leases, across, over, or through each of which petroleum and petroleum products are transmitted. Some of the tide and submerged lands so used are owned by the State; other portions of the tide and submerged lands so used are owned and administered by cities, counties, districts, and other public agencies that are recipients of legislative grants of such lands from the State. Some of the petroleum and petroleum products that move across, over, or through the aforementioned facilities are being transported in interstate or foreign commerce. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

6. Each and every allegation of paragraph 9 is denied.

7. Answering paragraph 10, said paragraph consists solely of conclusions purporting to be accurate statements of law, as opposed to fact. As such, they are not deemed admitted if not responded to. Nevertheless, to the extent that said conclusions are not accurate statements of law, they are denied. Any implication in subdivision (a) of said paragraph that rent is a tax or duty is specifically denied, and any implication in subdivision (c) of said para-

graph that rent calculated on the volume of commodities passing over leased land is a duty of tonnage is specifically denied.

8. Answering paragraph 11, paragraph 8 of this Answer is hereby incorporated herein by reference. It is admitted that the Commission, as to lands that are owned by the State and administered by the Commission, has made ground leases for such lands, including tide and submerged lands, and that some of said leased lands have been used for the construction of wharves, similar facilities, and pipelines. In many cases, the Commission leases unimproved land without the provision by the Commission of additional facilities or services. Prior to April 28, 1976, the Commission collected rent for ground leases based upon a percentage of negotiated fee value, or a percentage of gross receipts, or, for pipelines only, a rental based upon a stated number of cents per diameter inch per lineal foot of pipeline. Except as expressly herein admitted, each and every allegation of paragraph 11 is denied.

9. Answering paragraph 12, paragraph 1 of this Answer is hereby incorporated herein by reference. Except as expressly herein admitted, each and every allegation of paragraph 12 is denied.

10. Answering paragraph 13, it is admitted that, as new ground leases for commercial, industrial, or right of way uses are applied for, or as such leases come up for renewal or rental renegotiation as provided for in some leases, or as lessees under such leases request modifications in existing leases, the Commission reviews the criteria contained in section 2005(h) of its regulations (Tit. 2, Cal. Admin.Code, § 2005(h)) to determine whether use of a volumetric rental mode, as authorized by section 2005 of its regulations, is appropriate. Where such volumetric rents are found to be appropriate, they are negotiated with the lessee on a case-by-case basis. Except as expresly herein

admitted, each and every allegation of said paragraph is denied.

11. Each and every allegation of paragraph 14 is denied.

12. Answering paragraph 15(a), it is admitted that plaintiff WOGA's membership includes companies that produce, transport, refine, and market crude petroleum in the Western United States and California, that some member companies use pipelines located on tide and submerged lands within the State of California to transport crude petroleum, natural gas, or refined petroleum products, and that some member companies use wharves, anchorages, or similar facilities at which tankers are moored and over which various commodities pass. Some of the aforementioned commodities are being transported in interstate or foreign commerce. Except as expressly herein admitted, each and every allegation of the first two sentences of paragraph 15(a) is denied, based upon a lack of information or belief sufficient to admit or deny said allegations. Each and every allegation of the third sentence of paragraph 15(a) is denied.

13. Answering paragraph 15(b), the allegations of the first, second, and fourth sentences are admitted. A firm rent was not fixed at the time of the original lease to Sequoia Refining Corporation, and a firm rent still had not been fixed at the time of the assignment of the lease to Pacific Refining Company. Contemporaneously with the assignment of the lease to Pacific, a volumetric rent was negotiated with Pacific and incorporated into an amendment of the original lease. Such rents are currently exceeding $75,000.00 per year. It is admitted that Pacific's refinery is served by facilities at which vessels are moored and loaded and unloaded, that said facilities are located on land under lease from the State, and that some of the commodities over said facilities are transported in interstate or foreign commerce. It is denied that all such commodities are being

transported in interstate commerce or foreign commerce, or both, based upon a lack of information or belief sufficient to admit or deny said allegation. Except as expressly herein admitted, each and every one of the remaining allegations of paragraph 15(b) is denied.

14. Answering paragraph 15(c), the allegations of the first sentence are admitted. Answering the second through fourth sentences of said paragraph, it is admitted that Union has negotiated a volumetric rent with the Commission in connection with the renewal of its lease for wharf facilities serving its San Francisco refinery, that said rent is calculated with reference to the volume of crude and refined petroleum passing over the leased land, and that the average annual volumetric rent under said lease has been approximately $90,000.00 per year. Except as expressly herein admitted, each and every remaining allegation of paragraph 15(c) is denied.

15. Answering paragraph 15(d), it is admitted that plaintiff Tosco Corporation holds a lease from the Commission for wharf facilities over which coke and other commodities are transported; that said lease was renewed in March 1976, prior to the amendment of the Commission's regulations to authorize the negotiation of volumetric rents; that the renewal fixed an annual rent of $9,266.40, which was considered by the Commission to be a fair rent under the authorized rental modes then in use by the Commission; that said renewal provided that the rent could be later reset to conform with any subsequent changes or additions to the Commission's rental regulations; and that, by letter dated July 29, 1976, the Commission staff proposed a volumetric rent of five cents per ton computed with reference to any and all bulk commodities passing over the leased premises and a minimum rent of 9,266.40. To date, no volumetric rent has been negotiated regarding said lease. Except as expressly herein admitted, each and every allegation of paragraph 15(d) is denied.

16. Answering paragraph 15(e), it is admitted that plaintiffs Exxon Corporation, Getty Oil Company, Shell Oil Company, and Standard Oil Company of California each hold ground leases from the State that are administered by the Commission and that some of those leases will be coming up for renewal in the future. As such leases come up for renewal, the Commission will consider the appropriateness of the volumetric rental mode, using the criteria set forth in section 2005(h) of its regulations, and volumetric rents will be negotiated in those situations where they are determined to be appropriate by the Commission. Except as expressly herein admitted, each and every allegation of paragraph 15(e) is denied.

17. Each and every allegation of paragraph 16 is denied.

18. Answering paragraph 17, it is admitted that plaintiffs have exhausted their administrative remedies with regard to challenging the validity of the general authorization contained in the Commission's regulations for the charging of rents based upon the volume of the commodities passing over the leased land.

19. Each and every allegation of paragraph 18 is denied.

SECOND CLAIM

20. Answering paragraph 19, paragraphs 1 through 19, inclusive, of this Answer are hereby incorporated herein by reference.

21. Answering paragraph 20, it is admitted that those wishing to lease State-owned lands that are administered by the Commission must apply to the Commission for a lease, and that lands that are the subject to such lease applications must be appraised pursuant to California Public Resources Code section 6503 upon receipt of the

application. Except as expressly herein admitted, each and every allegation of paragraph 20 is denied.

22. Each and every allegation of paragraph 22 is denied.

THIRD CLAIM

23. Answering paragraph 23, paragraphs 1 through 19, inclusive, and 21 and 22 of this Answer are hereby incorporated herein by reference.

24. Answering paragraph 24, it is admitted that an actual controversy exists between some of the plaintiffs and the Commission concerning the validity and lawfulness of the amendments to the Commission's regulations that authorize an alternative volumetric rental mode whereby rent is computed based upon the volume of commodities passing over the leased land. It is further admitted that said plaintiffs are entitled to a declaration concerning the validity of said regulations, but that said declaration should be that the regulations are lawful and valid.

FIRST AFFIRMATIVE DEFENSE

25. Plaintiffs' Second Claim has been finally adjudicated in the California State courts. Accordingly, prosecution of that claim is barred by res judicata.

SECOND AFFIRMATIVE DEFENSE

26. In the State court litigation referred to in paragraph 25 above, it has been finally adjudicated that the Commission's regulations, insofar as they authorize the Commission to charge rent for ground leases based upon the volume of commodities passing over the leased land, are not unreasonable, arbitrary, or capricious. Accordingly, plaintiffs are collaterally estopped from asserting in this litigation that said volumetric rental mode is an unreasonable method of computing rent for ground leases.

WHEREFORE, it is prayed:

1. That a declaration issue declaring that sections 2005 and 2006 of the regulations of the California State Lands Commission (Cal. Admin. Code, tit. 2, §§ 2005, 2006, formerly §§ 2006, 2007), which authorize rents for the leasing of State land based upon the volume of commodities passing over the leased land, are lawful and valid;

2. That plaintiffs, and each of them, be denied any injunctive relief whatsoever;

3. That, except for the declaration set forth in paragraph 1 of this prayer, plaintiffs, and each of them, take nothing by this action;

4. That defendants be awarded their costs of suit against plaintiffs, jointly and severally; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: February 11, 1981.

George Deukmejian
Attorney General
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
Attorneys for Defendants

[Affidavit of service by mail omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 84-16

Kenneth Cory, Leo T. McCarthy and Jesse R. Huff,
Appellants,

v.

Western Oil and Gas Association, et al.

APPEAL from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 1, 1984

Justice O'Connor took no part in the consideration or decision of this case.